Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

THE GARTER BELT, INC., a
Michigan corporation, d/b/a Legg's Lounge

Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL PAGINATION IS NOT CONTINUOUS.

QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN APPLYING RATIONAL BASIS SCRUTINY TO DETERMINE THE CONSTITUTIONALITY OF RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) DESIGNED TO RESTRAIN EXPRESSIVE DANCE OR SPEECH?**

II. **WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN DETERMINING THAT RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) WAS NOT UNCONSTITUTIONALLY INVALID FOR OVERBREADTH AND VAGUENESS AND REQUIRED UNACCEPTABLE GOVERNMENTAL INVOLVEMENT?**

III. **WHETHER THE MICHIGAN APPELLATE COURT'S AFFIRMATION OF THE TRIAL COURT'S PERMANENT INJUNCTION CONSTITUTED PRIOR RESTRAINT, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?**

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Parties to the appeal in the Michigan Supreme Court were:

The Garter Belt, Inc., a Michigan corporation, d/b/a Legg's Lounge.

Petitioner/Appellant

Charter Township of Van Buren, A Michigan municipal corporation

Respondent/Appellee

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 29(6), The Garter Belt, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Dated: 9/22/04

Michael L. Donaldson
Attorney for Petitioner

TABLE OF CONTENTS

Questions Presented for Review	i
List of Parties to the Proceedings in the Court Below	ii
Disclosure of Corporate Affiliations and Financial Interest	ii
Table of Contents - Appendix	iv
Table of Authorities	vi
Citations of Official and Unofficial Opinions and Orders Entered in the Case	x
Statement of Jurisdiction	xi
Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved	xii
Statement of Case	1
Argument and Reasons for Granting the Writ	6
Conclusion	25
Appendix	1a

TABLE OF CONTENTS - APPENDIX

A.	Order of the Michigan Supreme Court Denying Leave to Appeal	1a
B.	Published Decision of the Michigan Court of Appeals	2a
C.	Order of Michigan Supreme Court Denying Stay	37a
D.	Order of the Michigan Court of Appeals Denying Rehearing	39a
E.	Order of the Michigan Court of Appeals Denying Stay	40a
F.	Order of Wayne County Circuit Court Affirming Decision Not to Disqualify	41a
G.	Order of Wayne County Circuit Court Denying Motion to Vacate Judgment and Denying Disqualification	43a
H.	Order of Wayne County Circuit Court Granting Permanent Injunction	45a
I.	Order Granting Plaintiff Leave to Amend Complaint	48a
J.	Order of United States District Court Eastern District of Michigan Remand to Wayne County	50a
K.	Complaint for Injunctive Relief	55a
L.	Defendant's Answer To Complaint	62a

M.	Affirmative Defenses	66a
N.	Counter Complaint	70a
O.	Plaintiff's Answer to Counter Complaint and Affirmative Defenses	88a
P.	Plaintiff and Counter Defendant's Motion for Summary Disposition with Brief in Support	103a
Q.	Defendant's Response to Plaintiff's Motion for Summary Disposition	126a
R.	Affidavit of Daniel Linz	165a
S.	United States Constitution-First Amendment Fourteenth Amendment	173a
T.	United States Constitution-Twenty-First Amendment	175a
U.	Van Buren Township Ordinance 2-16-99(2)	176a
V.	Michigan Court Rule 2.116	178a

TABLE OF AUTHORITIES

CASES:

44 Liquormart v. Rhode Island,
517 U.S. 484; 6 S. Ct. 1495; L. Ed 2d 711 (1996) 3, 6, 25

Bantam Books, Inc., v. Sullivan,
372 U.S. 58, 70, 83 S. Ct. 631, 9
L. Ed., 2d 584 (1963) 22

Barnes v. Glenn Theatre, Inc.,
501 S. Ct. 560; 1111 S. Ct. 2456; 115
L. Ed. 2d 504 91991) 8, 15, 17, 18, 20

California v. LaRue 409 U.S. 109, 93 S. Ct.
390, 34 L. Ed. 2d 342 (1972) 5, 8

Charter Township of Van Buren v. The Garter
Belt, Inc., d/b/a Legg's Lounge, 258 Mich App
594; 673 NW 2d 111 (2003) 5

Chicago v. Morales, 119 S. Ct. 1849, 1861-62 (1999) 21

City of Erie v. Pap's A.M.,
592 U.S. 227, 120 S. Ct. 1382,
191, 16 L. Ed. 2d 265 (2000). 3, 6, 11, 16

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750, 755-756 (1988) 23

City of Los Angeles v. Alameda Books, Inc.,
535 US 425; 122 S. Ct. 1728; 152
L. Ed 2d 670 (2002) 6, 7, 8, 10, 25

Erie Boulevard Triangle Corp v. City of Schenectady,
152 F. Supp 2d 241 (N.D.N.Y. 2001) 13

Flanigans Enterprises, Inc., v. Fulton County,
242 F. 3d 976 (11th Cir. 2001) 12

Freedman v. Maryland, 380 U.S. 51, 85
S. Ct. 734, 13 L. Ed. 2d 649 (1965) 22, 23

Grayned v. City of Rockford, 408 US 104, 108, 92 S. Ct.
2294, 33 L. Ed 2d 222 (1972) 20

J.L. Spoons, Inc. v. O'Connor,
194 F.R.D. 589 (N.D. Ohio 2000) 16

Jott, Inc. v. Charter Township of Clinton,
224 Mich App 513 (1997 3, 5, 9, 10, 13, 14, 19

Keyishian v. Board of Regents,
385 US 589, 603-04, 87 S. Ct. 675,
17 L. Ed 2d 629 (1967) 21

Kolender v. Lawson, 461 US 352, 358,
103 S. Ct. 1855, 75 L. Ed 2d 903 (1983) 20, 21

Lady J. Lingerie v. City of Jacksonville,
176 F. 3d 1358 (11th Cir., 1999) 23

MD II Entertainment, Inc., v City of Dallas,
935 F. Supp. 1394, 1398-99 (N.D. Tex 1995) 18

Michigan ex rel Wayne Co Prosecutor v. Dizzy Duck,449
Mich 353; 535 NW 2d 178 (1995) 24

Nakatomi Investments, Inc. v. City of Schenectady, 949 F.

Supp 98 (N.D.NY 1997) 19

Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed 1357 (1931) 22

Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976) 23

Nightclubs, Inc. v. City of Paducah, 202 F. 3d 884 (6th Cir. 2000) 22

Peek-a-Boo Lounge v. Manatee County, FL, 337 F. 3d 1251 (11th Cir. 2003) 20

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 91986 9, 10, 11, 13, 16

Schad v. Borough of Mt. Ephraim, 452 US 61; 101 S. Ct. 2176; 65 L. Ed 2d 671 (1981) 8

Schultz v. City of Cumberland, 228 F. 3d 831 (7th Cir, 2000) 23

Stevenson v. City of Vicksburg, 900 F. Supp 1, 11 (S.D. Miss 1994) 18

Triplett Grille, Inc., v. City of Akron, 40 F. 3d 129, 135 (6th Cir. 1994) 15, 16, 17

United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) 6,7, 8, 9, 10, 12, 18, 25

Vance v. Universal Amusements Co. Inc. 445 US 308; 100 S. CT. 1156; 63 L. ED. 2D 413 (1980) 22

XLP Corp. v County of Lake,
743 NE 2d 162 (Ill App 2000) 11, 13

UNITED STATES CONSTITUTION

First Amendment 2, 5, 7, 8, 9, 15, 19, 10, 21, 23

Fourteenth Amendment 2, 8

Twenty-First Amendment 5, 8

MICHIGAN COURT RULES

MCR 2.116 4

LOCAL GOVERNMENT ORDINANCE

Charter Township of Van Buren
Ordinance no. 2-16-99 (2) 1, 3, 4, 13, 14, 15, 20

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

The Final Opinion of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal was not reported and is reprinted in the Appendix at page 1a. The Opinion of the Michigan Court of Appeals was published, 258 Mich App 594; 673 NW 2d 111 (2003), is set forth in the Table of Authorities, but is also reprinted in the Appendix at page 2a-36a. The Michigan Supreme Court Order denying stay was not reported and is reprinted at Appendix 37a - 38a. The Court of Appeals Order denying rehearing of stay was not reported and is reprinted at Appendix 39a. The Court of Appeals Order granting immediate consideration and denying stay was not reported and is reprinted at Appendix 40. The trial court Order of December 20, 2001 denying disqualification and affirming the trial judge decision denying disqualification and denying motion to vacate judgment was not reported and is reprinted at Appendix 41a-42a. The trial court Order of December 14, 2001 denying disqualification and denying motion to vacate was not reported and is reprinted at Appendix 43a-44a. The trial court Judgment and Order of Permanent Injunction was not reported and is reprinted at Appendix 45a-47a. The trial court Order granting respondent leave to amend its complaint was not reported and is reprinted at Appendix 48a-49a. The Order of the United States District Court for the Eastern District of Michigan remanding the captioned matter to the Wayne County Circuit Court was not reported and is reprinted at Appendix 50a-52a. The Order to Show Cause was not reported and is reprinted at Appendix 53a-54a.

STATEMENT OF JURISDICTION

The Opinion of the Michigan Supreme Court denying Application for Leave to Appeal was dated June 24, 2004. Jurisdiction of this Court is invoked under 28 U.S.C. 1257, which permits review of a final judgment of the highest Court of a State by this Court upon Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution
First Amendment
Fourteenth Amendment
Twenty-First Amendment

Michigan Court Rules
MCR 2.116

Van Buren Township Ordinance
02-16-99(2)

STATEMENT OF THE CASE

Petitioner was incorporated in 1983. On March 2, 1999, Respondent, Van Buren Township, County of Wayne, State of Michigan, adopted Ordinance 2-16-99(2), "Nudity on Licensed Premises." (App 175a-176a). This Ordinance was directed specifically at Petitioner, as Petitioner was the only adult entertainment facility in the Township.

The Ordinance's intent was to proscribe public nudity in any facility licensed by the Michigan Liquor Control Commission. The Ordinance defines nudity as:

> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
> the whole or part of the pubic region;
> the whole or part of the anus;
> the whole or part of the buttocks;
> the whole or part of the genitals;
> the breast area including nipple, or more than one-half of the area of the breast. (App 175a-176a).

There are no exceptions in the Ordinance for nudity in a public place such as a theater, stadium, health club, etc. Nudity is banned at all times in establishments licensed to sell alcohol, including movie theaters, as well as any public place.

On November 6, 2001, Respondent filed a complaint to enforce Ordinance 2-16-99 (2). (App 55a-60a) Respondent sought a permanent injunction precluding Petitioner from violating the Ordinance and a declaratory judgment as to constitutionality. (App 55a-60a). In addition, Respondent filed a Motion for a Preliminary Injunction. On November 30, 2000, Petitioner filed its answer to Respondent's Complaint (App 61a-

64a) and its affirmative defenses.[1] (App 65a-67a)

On October 1, 2001, Petitioner filed a Counter-Complaint. (App 68a-85a) Petitioner alleged that the Ordinance violated the First and Fourteenth Amendments to the United States Constitution, (App 172a-173a)was overbroad, vague, and not supported by any evidence that adult entertainment, in general or Petitioner's business in particular, engendered any "adverse secondary effects", as required by federal precedent. Petitioner sought a declaratory judgment that the Ordinance was unconstitutional and sought entry of an injunction against Township against enforcement of the ordinance. Respondent answered (App 86a-100a)

On October 31, 2001, Respondent filed a Motion for Summary Disposition. (App 101a-123a). On November 27, 2001, Petitioner filed its Response to Respondent's Motion (App 124a-163a). The motion was argued on November 30, 2001.

The trial judge to whom the case was assigned became unable, temporarily, to preside. A visiting judge, John D. O'Hair, appeared. During argument, Judge O'Hair stated that he did not believe that expressive dancing was the subject of First Amendment protection.

> MR. SHAFER: ...And the fact is, whether we like it or not, this is a form of expression protected by the First Amendment. If in fact....
>
> THE COURT: That's where we differ; I don't

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1. Petitioner, in its initial response, asserted that ordinance violates the Michigan Constitution and that the Petitioner was preempted by State law from enacting such an ordinance. Petitioner attempted to remove the matter to the United States District Court for the Eastern District of Michigan. The District Court abstained and remanded the matter back to the Wayne Circuit Court. (App50a-52a).

believe it is...

Respondent offered no evidence of adverse secondary effects except for the post ordinance adoption inquiries of Township Planner, Bryce Kelley. Kelley testified that he made a personal comparison of police calls to the geographic area where Petitioner was located with a strip mall in another geographic area with no adult entertainment and found that police made 30% more responses to the geographic area where Petitioner was located. However, Kelley testified that he did not provide this information to the Township Board.

Respondent relied primarily on a 1997 Michigan Court of Appeals decision, Jott, Inc. v Charter Township of Clinton, 224 Mich App 513 (1997). Respondent argued that Ordinance 2-16-99(2) was identical to the ordinance in Jott and therefore was constitutional.[2]

Petitioner offered deposition testimony of two Township officials, Joannie Payne, Township Clerk and member of the Board of Trustees, and Cindy King, Township Supervisor and member of the Board of Trustees and the affidavit of Dr. Daniel Linz (App 164a-171a) in response.

Ms. Payne testified that she was aware of no complaints generated because of Petitioner's business, that she did not know of anyone who lives in the Township who had been negatively affected by Petitioner's business, and that she was aware of no complaints regarding any decrease in property values or increase in crime in the area surrounding Petitioner's business.

Cindy King testified that neither the Board of Trustees

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2. Respondent asserted that Jott had been abrogated by the United States Supreme Court Decision in City of Erie v. Pap's A.M., 592 U.S. 227, 120 S. Ct. 1382, 191, 16 L. Ed. 2d 265 (2000) and 44 Liquormart v. Rhode Island, 517 U.S. 484; 6 S. Ct. 1495; L. Ed 2d 711 (1996), and required, at a minimum, that the trial court apply intermediate scrutiny.

nor anybody else did any studies on the effects of adult entertainment in the Township, that they did not review any outside studies that had been done by other communities in connection with the adoption of these ordinances, and that nobody testified or provided any information to the Board relevant to these issues.

She further testified that nobody provided any information to her, nor was there any discussion, as to how requiring dancers to cover more body parts would result in a reduction of any alleged secondary effects. Rather, according to Ms. King the ordinance was adopted as a matter of **ministerial function of updating the Township's ordinances**. Ms. King further testified that there were no complaints about nudity at the bar, or other problems associated with the bar, such as the bar restricting the Township's growth or inhibiting or affecting property values in the Township.

In his affidavit, Dr. Linz stated that Respondent conducted no

> studies or research that establish or demonstrate that exotic dance clubs which serve alcoholic beverages engender sufficient "secondary effects" so as to warrant the enactment of an anti-nudity law such as Van Buren Township Ord. 2-16-99(2). In fact, the research appears to be just to the contrary. (App 164a-171a).

Despite the clear language of Michigan Court Rule 2.116 (C)(10) (App 177a-181a), the trial court determined that there was no genuine issue of material fact. The trial judge stated that "a legislative body can consider any material it wishes, including common sense" and stated that the issue was whether there was a "rational basis" for legislative action.

On December 11, 2001, an Order Granting Summary Judgment was entered. (App 45a-47a). A Motion to Vacate the Injunction and Disqualify was filed and denied. (App 43a-44a).

On December 20, 2001, Petitioner appealed the Order

upholding the constitutionality of the Ordinance and granting Respondent a permanent injunction. (App 41a-42a). A Motion for Stay was filed in the Court of Appeals and denied. (App 40a) A Motion for Stay was made in the Supreme Court and denied. (App 39a).

On September 16, 2003, oral argument was held in the Michigan Court of Appeals and 9 days later, the Michigan Court of Appeals issued a 20-page Opinion, Charter Township of Van Buren v. The Garter Belt, Inc., d/b/a Legg's Lounge, 258 Mich App 594; 673 NW 2d 111 (2003) (App 2a-21a) denying Petitioner's appeal.

The Michigan Court of Appeals, after disposing of non-constitutional issues, began its decision by stating that it was bound by Jott, supra, and reaffirmed that the appropriate standard of scrutiny when reviewing ordinances restricting First Amendment free speech expression was "rational basis." Further, the Michigan Court of Appeals, as more fully discussed hereinafter, determined that this Court's decision in California v. LaRue, 409 U.S. 103 (1972) and its reliance on the Twenty-First Amendment (App 174a) was controlling.

The Michigan Court of Appeals held, based on Jott, that no evidence of adverse secondary effects was necessary to adopt an ordinance designed to restrain speech. It further held that the injunction was not a prior restraint and held that "enforcement of Plaintiff's content-neutral, constitutional ordinance" is not prior restraint. Additionally, the Michigan Court of Appeals, regarding overbreadth, stated: "that nudity is not protected expressive conduct , it is erotic nude dancing that is expressive conduct at the outer edges of the protection afforded by the First Amendment." Stating that the ordinance " does not present a real substantial danger of chilling protective speech" and identical to the ordinance in Jott and not overly broad.

Citing Hill v. Colorado 530 U.S. 703, 732; 120 S.Ct. 2400; 147 L Ed. 2d. 597 (2000) the Michigan Court of Appeals stated"An ordinance is not vague if it is clear what the ordinance as a whole prohibits." It found the ordinance did not "confer

unfettered discretion to those empowered to enforce the ordinance to determine whether it has been violated."

Petitioner timely appealed to the Michigan Supreme Court. On June 24, 2001 the Michigan Supreme Court denied Application for Leave. (App 1a.)

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The decision of the Michigan Court of Appeals, in this case, is in direct conflict with this Court's decision in 44 Liquormart v. Rhode Island, 517 US 484, 116 S.Ct. 1495, 134 L. Ed 2d 711 (1996), City of Erie v. Pap's A.M., 592 US 227, 120 S.Ct. 1382, 191, 16 L.Ed. 2d 264 (2000), City of Los Angeles v. Alameda Books, Inc., 535 US 425; 122 S.Ct. 1728; 152 L.Ed 2d 670 (2002) and the decisions of the Sixth Circuit Court of Appeals. By denial of leave, the Michigan Supreme Court has effectively ratified this position. It is the position of the Michigan appellate courts that they are bound by their own law and not the decisions of this Court.

The Michigan appellate courts, by the published opinion in this case, have adopted the "rational basis" standard for review of regulations and ordinances designed to restrain speech, whether content-based or content-neutral, a standard specifically rejected by this Court. In Purple Orchid Inc., v Pennsylvania State Police, 721 A. 2d 84 (Pa. Commn. Ct. 1998), the court noted that this Court, in 44 Liquormart made clear and reaffirmed "that the [U.S. v.]O'Brien [391 US 367, 377, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968)] **intermediate level of review** applied to the **prohibition of nudity** in liquor license establishments...." (Emphasis added).

In Pap's, Justice O'Connor, writing for the Court, stated:

> To determine what level of scrutiny applies to the ordinance at issue here, we must decide 'whether the State's regulation is related to the

> suppression of expression." Texas v. Johnson, 491 US 397, 403 (1989); see also United States v. O'Brien, 391 US at 377. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from O'Brien for evaluating restrictions on symbolic speech. Texas v. Johnson, supra, at 403; United States v. O'Brien, supra, at 377. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the O'Brien test and must be justified under a more demanding standard. Texas v. Johnson, supra, at 403.
>
> In City of Los Angeles, supra, Justice Souter wrote:
>
> This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation of expression...Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of expressing a message that is disagreeable to listeners, readers or the government...The comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straight forward restriction going only to the time, place or manner of speech or other expression.

This Court has, on no less than three occasions, recognized that nude and partially nude dance performance activities of the type sought to be presented by Petitioner is expression, protected by the First Amendment to the United States Constitution, as made applicable to the States by

operation of the Fourteenth Amendment. Pap's A.M., (7 Justices); Barnes v. Glenn Theatre, Inc., 501 S. Ct. 560; 1111 S. Ct. 2456; 115 L. Ed. 2d 504 91991) (8 Justices); and Schad v. Borough of Mt. Ephraim, 452 US 61; 101 S. Ct. 2176; 65 L. Ed 2d 671 (1981). The trial court and the Michigan Court of Appeals held to the contrary.

The Michigan Court of Appeals held that "Nudity is not expressive conduct" and then held that "It is erotic nude dancing that is expressive conduct at the outer edges of the protection of the First Amendment." The Michigan Court of Appeals decision is replete with such inconsistencies. Michigan may be the only state in the nation that is still applying the LaRue decision and relying on the Twenty-First Amendment to use the rational basis test on ordinances regulating First Amendment protected expression.

As Justice O'Connor stated in Pap's, the standard of scrutiny to be applied in reviewing regulations designed to restrain speech is either (1) strict scrutiny, if the ordinance is content-based, or (2) intermediate scrutiny, if the ordinance is content-neutral. In Pap's, Justice O'Connor stated that a general "across the board" anti-nudity provision was to be analyzed content-neutral and evaluated under the four part test of O'Brien, supra:

1. Whether the regulation at issue is within the government's power;
2. Whether the regulation furthers an important or substantial governmental interest;
3. Whether the governmental interest is unrelated to the suppression of free expression; and
4. Whether the incidental restriction on alleged First Amendment freedom is no greater than essential to the furtherance of that interest.

The second prong of O'Brien is "whether the regulation furthers an important or substantial governmental interest." In Pap's, supra, and City of Los Angeles, supra, a majority of the Court also concluded that the sole justification for enacting such

a prohibition, under the second prong of O'Brien, would be in regard to the "secondary effects" of certain forms of adult entertainment establishments. See, e.g. Pap's, 120 S. Ct at 1393-94, 1402. In considering the predicate of such "secondary effects" (such as increase of crime, decrease in property values, increase in urban blight) as a justification for enacting a regulation:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986). Accordingly, to pass constitutional muster under the "secondary effects" doctrine, a city must: (1) Have a problem; and (2) be in possession of evidence of the problem that it (3) relies upon and (4) that is reasonably believed to be relevant to the problem to be addressed.

The Michigan Court of Appeals stated that Respondent needed no evidence except "common sense". The Michigan Court of Appeals, by applying the rational basis scrutiny, did not consider whether Respondent's Ordinance furthered a substantial government interest. In this case, Respondent offered no evidence to the trial court that it relied on adverse secondary effects. To the contrary, the only evidence known to the Township Board at the time it adopted the Ordinance was to the effect that there were no problems associated with Petitioner's business operation.

In Jott, there was evidence of various studies performed by Township officials. However, the undisputed evidence in this case was that there were no studies or adverse effects considered. Because of the lack of studies and evidence regarding adverse secondary effects, the Michigan Court of

Appeals adopted the "common sense" standard. Dr. Linz's study and supporting documents were disregarded by the trial court and the Michigan Court of Appeals. The Michigan Court of Appeals held that the affidavit of Dr. Linz did not cast sufficient doubt so as to require trial and stated:

> Moreover, as already discussed, this Court held in Jott that a rational basis exists for banning nudity from establishments licensed to sell alcohol. No further evidentiary showing by plaintiff was necessary in this case where plaintiff's ordinance and the one this Court held to be "constitutionally valid and enforceable" were, in pertinent part, identical. Jott, supra at 548.

Further, the Court of Appeals stated that O'Brien did not require an evidentiary showing. However, in O'Brien, the Court noted that burning of draft cards was itself sufficient evidence of adverse secondary effects to meet the governmental interest requirement.

In City of Los Angeles, Justice O'Connor wrote that the Renton requirement that a municipality act on evidence "reasonably believed to be relevant to the problem of secondary effects does not mean:

> That a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to

> supplement the record with evidence renewing support for a theory that justifies its ordinance. 122 S. Ct. at 1736.

This reasoning was supported by a majority of this Court.

In XLP Corp. v County of Lake, 743 NE 2d 162 (Ill App 2000), the government sought summary disposition in regard to a constitutional challenge to an adult business regulatory ordinance. The trial court granted summary judgment on the pleadings, and the appellate court reversed, noting that:

> None of the cases cited by the Defendant in support of its position that a governmental body can rely on outside studies, judicial decisions, and the experiences of other governments in other jurisdictions in adopting its legislation were decided on a ***motion for judgment on the pleadings*** as occurred here. Nor has our research revealed any cases of this nature. In every case relied upon by Defendant, ***the affected party had an opportunity to go to trial or to test the assertions of governmental interests in an evidentiary proceeding.*** This was true even in [Pap's v. City of] Erie where, as pointed out in the Supreme Court's opinion, the affected party had ample opportunity to contest the city council's findings about secondary effects, including in-state proceedings, although it never chose to do so. Pap's v. City of Erie, 529 US at 298)

XLP at 167-168 (emphasis and clarification added).

The county in XLP also attempted to rely on Renton for the proposition that a legislative body does not have to wait until a problem occurs before enacting an adult use ordinance. 743 NE 2d at 170. But the court noted that there was a crucial difference, because in Renton there were no adult businesses in existence at the time the city enacted its ordinance... Here,

however, where plaintiffs had been in business for fifteen years at the time defendant enacted its ordinance, plaintiffs allegations that defendant wrongly relied on outside studies instead of considering plaintiff's existing businesses to determine whether such businesses cause adverse secondary effects presented an ***issue of fact***. Id at 170 (clarification and emphasis added). Because a factual dispute existed on this issue, the court determined that the case must be sent back for further proceedings.

In a case that is almost factually indistinguishable from the case at bar, the Eleventh Circuit considered the constitutionality of an ordinance prohibiting various forms of nude and partially nude dancing in liquor establishments in Flanigans Enterprises, Inc., v. Fulton County, 242 F. 3d 976 (11th Cir. 2001). The Eleventh Circuit noted that in evaluating whether the government has met its burden under O'Brien, the Defendants must have "some factual basis for the claim that [adult] entertainment in an establishment serving alcoholic beverages results in increased criminal activity and other undesirable community conditions." Id. At 985 (internal cites omitted.)

The court determined that the evidence in the record relating to the conditions in Fulton County shows unequivocally that property values in neighborhoods adjoining the Clubs have increased during the time the Clubs have been in existence and the surrounding buildings show no sign of blight, or lack of physical maintenance. Moreover, the Fulton county police study found greater reported crime connected with establishments that served alcohol but did **not** feature adult entertainment. Id at 986.

The Court basically determined that where local evidence showed no secondary effects, the governmental body could not simply ignore it. The Court concluded by stating that "the case might be different were the clubs a recent addition to Fulton County neighborhoods, therefore justifying sole reliance on outside studies. It is undisputed, however, that plaintiffs

continually operated these adult entertainment establishments for nearly a decade." Id at 986. The same circumstances exist here.

Similarly, in Erie Boulevard Triangle Corp v. City of Schenectady, 152 F. Supp 2d 241 (N.D.N.Y. 2001), a United States District Court evaluated the constitutionality of an amendment to a zoning ordinance dealing with adult businesses. In ruling the amendment unconstitutional under the Renton standard, the Court concluded that, as is the case here, "the city has submitted no evidence whatsoever that either the 1999 amendment or the 2000 amendment was designed to address secondary effects of adult businesses within the city which were not adequately addressed by the initial version of the adult ordinance, or that plaintiff's businesses are responsible for any adverse secondary effects in their current, grand-fathered locations." Id at 247.

The Michigan Court of Appeals did not address either XLP or Flanigan's Enterprises, Inc. when arriving at its decision. The Michigan Court of Appeals' entire decision in this case can be reduced to 3 words: "we reaffirm Jott."

The prohibition against nudity in Ordinance 2-16-99 (2) applies to all establishments licensed by the Michigan Liquor Control Commission, and the ordinance does not merely ban "true" nudity, but would also prohibit such attire as a dress that, although covering the nipple, has a plunging neckline which exposes any portion of the "breast area" or bikini bathing suit bottom that does not fully cover the "whole" area of the buttocks. The ordinary bikini does not cover the full buttocks and that is certainly true of a thong bathing suit.

The examples of what can be prohibited under this ordinance, far beyond the area of "adult" entertainment, are almost limitless, but a few selected examples make the constitutional point. Conduct that would be prohibited includes nude and semi-nude "legitimate" theatrical performances (e.g. *Hair, Equus Oh! Calcutta, Salome, and Dance of the Seven Veils*); and just about any opera or chorus line where there can be exposure of the specified body parts "either directly or

indirectly, including but not limited to, exposure, see-through clothing articles or body stockings..." See, Ord 2-16-99 (2) (defining "Nudity").

Most importantly, also prohibited would be any theatrical production, dance review, ballet or opera (in an establishment licensed to serve alcoholic beverages) where there is a bare chested **male** performer, in that the definition of "nudity" **does not distinguish between the male and female breasts**. These are examples of the forms of expressive nudity banned by the charging ordinance.

There are also a myriad of examples of non-expressive nudity that would similarly be prohibited. If a health club has a liquor license (and those that have adjoining restaurants usually do), nudity in the locker room, shower room, or even bathroom is prohibited (an individual will "frequent" or "loiter" in these areas — whatever those terms may mean). In fact, the exposure of the defined body parts in any bathroom in any bar in Van Buren Township is criminalized. There are, simply, no exceptions to the scope of this ordinance. Another example would be hotels, most of which have liquor licenses. Any form of nudity in the entire facility would be banned, including in one's own hotel room.

The Michigan Court of Appeals held, regarding overbreadth:

> The ordinance simply does not present a real and substantial danger of sweeping within its ambit the presentation of theatrical productions that involve nudity; nor do the other hypothetical situations defendant imagines present a real and substantial danger of chilling protected speech. Accordingly, plaintiff's ordinance is not constitutionally overbroad.

The Michigan Court of Appeals further stated: **"The Jott court's rejection of an overbreadth challenge binds this Court."** The Court stated that people using "restroom facilities are generally not engaged in expressive conduct." The conduct

regulated by this ordinance is not limited to merely expressive conduct, it criminalizes expressive and non-expressive conduct. It gives law enforcement unfettered discretion to arrest individuals that the police officer may not like by merely waiting for them to go to the bathroom in a bar and arresting them for exposure of their genitalia in a place that serves alcohol. By definition, this is overbreadth and does not inform the public of prohibited conduct. It is vague.

The Sixth Circuit U.S. Court of Appeals has recognized that "the overbreadth doctrine constitutes an exception to traditional rules of standing and is applicable in First Amendment cases in order to ensure that an overbroad law does not act to 'chill' the exercise of rights guaranteed protection." Triplett Grille, Inc., v. City of Akron, 40 F. 3d 129, 135 (6th Cir. 1994) (citations omitted). In Triplett, the City of Akron passed a public nudity ordinance which prohibited a person from knowingly or intentionally, in a public place, appearing in a state of nudity. "Nudity" under that ordinance was defined almost identically to how that term is defined under Ordinance 2-16-99 (2).

In a ruling that has direct application to the constitutional challenge at issue here, the Sixth Circuit found the Akron ordinance facially overbroad, by stating:

> The Akron public decency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only expressive activities associated with harmful secondary effects, and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its advent, expressive conduct not generally associated with prostitution, sexual assault, or other crimes. As Justice Souter acknowledged in Barnes v. Glen Theatres, Inc., 501 U.S. at 583 n 2: "It is difficult to see, for example, how the

> enforcement of Indiana statute against nudity in a production of "Hair" or "Equus" somewhere other than adult threatre, would further the state's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects.

Triplett, 40 F. 3d at 136 (clarification added).

In J.L. Spoons, Inc. v. O'Connor, 194 F.R.D. 589 (N.D. Ohio 2000), the court, entered a preliminary injunction against a "nudity" ban in alcohol establishments as being facially overbroad (issued prior to Pap's), stating that "the Supreme Court's recent decision in City of Erie v. Pap's simply does not shed any meaningful light on the overbreadth or vagueness analysis that underpinned this Court's decision to grant Plaintiff's Preliminary Injunction." J.L. Spoons, 194 F.R.D. at 592 (clarification added).

The court invalidated, as overbroad, an Ohio statute prohibiting nudity in a liquor license establishment.[3] In analyzing the Sixth Circuit decision in Triplett, the Court concluded that:

> The prohibition on appearing in a state of nudity contained in sections (a)(3) and (b)(2) is unconstitutionally overbroad for similar reasons. A variety of artistic performances, including the

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3. Rule 52 of the Ohio Liquor Code prohibited nudity which was defined as "a showing (including electronically)" of the human male or female genitals, pubic area or buttocks (anus) with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola, or the showing of the covered male genitals in a discernibly turgid state. J.L. Spoons, Inc. v. O'Connor, 190 F.R.D. 433, 436 (N.D. Ohio 1999).

> oft-cited "Hair" and "Equus" as well as smaller productions like Karen Finley's One Woman Shows, are constitutionally protected and involve nudity. Yet Rule 52 makes no exception for such artistic performances. When a regulation sweeps in performances that fall outside rubric of adult entertainment, the regulation is vulnerable to an overbreadth attack. In fact, the only difference between Rule 52's ban on nudity and the ordinance declared to be overbroad in Triplett Grille, **is that Rule 52 is limited to venues with liquor licenses. While Rule 52 does not amount to a total ban on public nudity, a ban does not need to be total to be substantially overbroad.** The relevant question is whether the regulation "reaches a substantial amount of constitutionally protected conduct," such that the regulation threatens to chill exercise of protected activity."

J.L. Spoons, Inc. v O'Connor, 190 F.R.D. 433 (N.D. Ohio, 1999) (emphasis added, cites omitted.)The decision in J.L. Spoons is consistent with the reasoning that the Supreme Court made very clear in Pap's, that nudity regulations could be constitutional only in relation to establishments that engendered "secondary effects."

In Barnes, the plurality opinion authored by Chief Justice Rehnquist indicated that "Indiana's requirement that the dancer wear at least pasties and g-strings is modest, and the bare minimum necessary to achieve the state's purpose." Barnes, 501 U.S. at 571-72. The Court re-examined and clarified this issue in Pap's, when the four-Justice plurality (and on this issue concurred by Justice Souter, giving a five member majority) stated that "it also may be true that a **pasties and g-string requirement** would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with **the requirement**

that the restriction be no greater than necessary to further the city's interest." Pap's, 120 S. Ct. at 1397 (emphasis added.).

This Court, in Barnes, further concluded that "the fourth and final O'Brien factor — that the restriction be no greater than is essential to the furtherance of the government interest — is satisfied as well." Id at 1397. This is because "any incidental impact on the expressive element of nude dancing is de minimis. The requirement that dancers wear **pasties and g-strings** is a minimal restriction in furtherance of the asserted government interest, and the restriction leaves ample capacity to convey the dancer's erotic message." Id. (Emphasis added.)

The Ordinance requires that one-half of the breast be covered. Effectively, the Ordinance requires the dancers to wear bikini tops. In MD II Entertainment, Inc. v City of Dallas, 935 F. Supp 1394, 1398-99 (ND Tex 1995), the District Court dealt with a nudity requirement similar but less restrictive than the ordinance in question and determined that "in the instant action, however, the city has gone far beyond a restriction aimed at nudity and a requirement that the dancers wear pasties and g-strings." The District Court noted that "no evidence indicates that requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects." Id. At 1398 (clarification added.)

A similar conclusion was reached in Stevenson v. City of Vicksburg, 900 F. Supp 1, 11 (S.D. Miss 1994):

> the ordinance before the court today is more restrictive inasmuch as the dancers/entertainers must wear the equivalent of a bikini tip and bottom, whereas the dancers in Barnes were only required to wear pasties and g-strings.
> The court determined that:
> The city has not met its burden in showing how a lesser degree of nudity furthers its stated interest in curtailing harmful secondary effects. Accordingly, the city's requirement that the

> dancers/entertainers wear more clothing than pasties and g-strings is not narrowly tailored to support its asserted interest in protecting and preserving the quality of the city's neighborhoods....Id. at 13.

Finally, the court in Nakatomi Investments, Inc. v. City of Schenectady, 949 F. Supp 988 (N.D.NY 1997) echoed these conclusions by stating:

> Each additional piece of required clothing must result in a further reduction in pernicious side effects. Without demanding this connection at each step, each additional layer of restriction can be legally added simply on the basis that the previous restriction was valid, until the entire activity is banned, i.e., nude dancing is permitted so long as the dancers wear pasties and g-strings; then bathing suits; then t-shirts; then long pants and a sweater... In recognition of the danger of creeping encroachment, the First Amendment requires, not that the restrictions merely be related to the governmental interest asserted, but rather than each restriction imposed furthers an important or substantial governmental interest.

Id at 997.

This Court's subsequent decision in Pap's substantiates the correctness of these three decisions and abrogates Jott on this key issue.

In this case, the ordinance goes well beyond the "de minimis" clothing limitation as set forth in Pap's. A "g-string" or thong bikini could not be worn, since it shows the entire buttocks. Similarly, "pasties" could not be worn in Van Buren Township since the "breast area" would not be covered. The Van Buren Township regulation prohibits more forms of expressive entertainment than can be prohibited under the First Amendment pursuant to the decisions of the United States

Supreme Court.

In Peek-a-Boo Lounge v. Manatee County, FL, 337 F. 3d 1251 (11th Cir. 2003), the Court, contrary to the Michigan Court of Appeals in this case, found that where there is a challenge as to the sufficiency of the government's evidence regarding secondary effects, the burden is on the municipality to produce evidence supporting its justification for the ordinance. In Peek-a-Boo, as in the instant case, the ordinance redrew "the boundary between nudity and non-nudity, thereby prohibiting exotic dancers from wearing the amount of body covering the court found to be consistent with the First Amendment in Pap's A.M. and Barnes." The ordinance, as does the ordinance in question, set mathematical limitations. For example, the ordinance required a covering of one-quarter of the breast surface and with reference to the buttocks, "one-half inch below the top of the vertical cleavage of the napes." The court found this to require unnecessary government involvement and was unrealistic. The court struck down the ordinance.

Ordinance 2-16-99 (2) is unconstitutionally vague. It is axiomatic that statutes which are vague and which are not subject to reasonable interpretation by common men, inherently deny due process and are therefore unconstitutional. Grayned v. City of Rockford, 408 US 104, 108, 92 S. Ct. 2294, 33 L. Ed 2d 222 (1972). To be constitutional, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 US at 108; Kolender v. Lawson, 461 US 352, 358, 103 S. Ct. 1855, 75 L. Ed 2d 903 (1983). As this Court noted in Grayned, constitutional concerns are heightened when a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," as such a law which:

> .... 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked. 408 US at 109

Precision in draftsmanship is the touchstone of constitutionality for a regulation which impacts upon First Amendment rights. Keyishian v. Board of Regents, 385 US 589, 603-04, 87 S. Ct. 675, 17 L. Ed 2d 629 (1967).

In addition to these concerns, there is an additional component to the vagueness doctrine. In Kolender, this Court observed that:

> ...the more important aspect of the vagueness doctrine is not actual notice [to the accused], but the other principal element of the doctrine — **the requirement that a legislature establish minimal guidelines to govern law enforcement'**...Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries **to pursue their personal predilections**. 461 US at 358.

The vagueness of this ordinance is multi-fold. Nudity is defined as the exposure of certain body parts "either directly or indirectly..." What does "directly or indirectly" mean? There is not "precision in draftsmanship" of this ordinance, there are no specific guidelines govern law enforcement, a person of ordinary intelligence does not know what is specifically prohibited, and the regulation acts as a chill on constitutionally protected expressive rights.[4] The ordinance is overly broad and

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4. The actual proscription section of the ordinance is also unconstitutional in utilizing the words "frequent" and "loiter." An individual who wishes to relieve him or herself is "frequenting" the bathroom, yet is this really what the ordinance attempts to proscribe? In regard to the fact that these provisions are impermissibly vague, this Court is referred to the recent decision of the United States Supreme Court in Chicago v. Morales, 119 S. Ct. 1849, 1861-62 (1999) (ruling as

vague.

The permanent injunction granted by the trial court and sustained on appeal constitutes prior restraint. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 9 L. Ed., 2d 584 (1963). The prior restraint doctrine was established in the seminal case of Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed 1357 (1931), but the case which is truly on "all fours" with the circumstances at issue here is that of Vance v. Universal Amusement Co, Inc. 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980). At issue there was a Texas public nuisance statute authorizing injunctions against the use of premises for the exhibition of what was considered to be obscene material. This Court held such a law unconstitutional.

> The Court of Appeals was quite correct in concluding both (a) that the regulation of communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance and (b) that the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for past communication. (Id at 316-16).

Given the fact that there were no "special safeguards"[5] governing the entry and review of such restraining orders, that law was unconstitutional. Similarly, here, the imposition of an

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unconstitutionally vague a "loitering" ordinance directed at criminal street gang members, which even had a specific definition as to what the word "loiter" meant.)

5. See, Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), and Nightclubs, Inc. v. City of Paducah, 202 F. 3d 884 (6th Cir. 2000).

"across-the-board" prohibition effectuates an impermissible prior restraint.

Issues regarding prior restraints are analyzed, not under intermediate scrutiny, but rather under "strict scrutiny" Schultz v. City of Cumberland, 228 F. 3d 831 (7th Cir, 2000) (See also Lady J. Lingerie v. City of Jacksonville, 176 F. 3d 1358 (11th Cir., 1999). Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights, Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976). While prior restraints are not per se unconstitutional, they bear a heavy presumption against their validity. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-756 (1988).

This Court has identified two primary situations that render zoning or licensing schemes unconstitutional. First, the scheme places "unbridled discretion" in the hands of a governmental official or agency. Second, the scheme does not limit the time within which the decisionmaker must issue a license or permit. See FW/PBS v. City of Dallas, 493 US 215, 225-226 (1990), see also Lady J. Lingerie, supra at 1361.

A law subjecting the exercise of the First Amendment freedoms to the prior restraints freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-151 (1969). In order to avoid constitutional problems caused by delay, this Court has determined that three procedural safeguards are necessary. These are:

3) The license or permit must be issued within a specified and reasonable time;
4) Prompt judicial review must be available; and
5) The decisionmaker must bear the burden of going to court to enforce the decision and bear the burden of proof once there.

FW/PBS, supra, at 27. (Citing Freedman v. Maryland 380 US

51 (1965).

The Michigan Court of Appeals found that the trial court's injunction did not constitute a prior restraint. In order to achieve this result, the Court of Appeals looked to Michigan ex rel Wayne Co Prosecutor v. Dizzy Duck, 449 Mich 353; 535 NW 2d 178 (1995). Dizzy Duck related to an establishment that did not serve alcoholic beverages. The issue in Dizzy Duck related to whether "lap dancing" constituted lewd conduct. The Court of Appeals then jumped from lewd and obscene conduct to state that the "effort to ban nude dancing because it is obscene may experience difficulties separating non-obscene expressive conduct from obscene expressive conduct." With due respect to the Court of Appeals, this Court has made it abundantly clear that nude dancing **IS NOT** obscene. It is a protected form of speech. No one, including Respondents, suggested to the trial court that the purpose of the ordinance was to ban obscene conduct. This ordinance is to regulate nude dancing and the attire that is required, not obscenity. Having mixed apples and oranges and thrown in a red herring, the Court found that there was no need to have "procedural safeguards because it was not necessary to draw the fine line between obscene and non-obscene dancing."

Petitioner would suggest that the Ordinance is content-based and requires strict scrutiny. This is certainly true as to the issue of prior restraint. However, assuming, arguendo, that the Ordinance is content-neutral, the Michigan Court of Appeals failed to apply the intermediate scrutiny required by Pap's, supra, and its progeny. No trial was conducted, no evidence produced, except by Petitioner, and that evidence went to the fact that there were no adverse secondary effects.

The Michigan Court of Appeals and the Michigan Supreme Court, by failure to grant leave, have concluded that nude or topless dancing is not protected free speech and that a local unit of government may regulate that conduct in any manner it sees fit, without regard to the decisions of this Court

or to the United States Constitution.

CONCLUSION

The published Michigan Court of Appeals decision, in this case, is in direct conflict with the decisions of this Court and all federal circuits. The Michigan appellate courts utilized an improper standard of scrutiny, specifically rejected by this Court in Pap's, supra, 44 Liquormart, supra and City of Los Angeles, supra. The Ordinance is unconstitutionally vague and overly broad. The Ordinance requires governmental involvement to the extent that the breast covering must cover one-half of the breast and the full buttocks, leaving to enforcement officers to determine whether the covering is less than one-half of the full breast or less than full covering of the buttocks.

The trial court expressed the opinion that nude or exotic dancing is not protected speech, contrary to the repeated decisions by this Court to the contrary. The trial court then permanently enjoined the dancers performing at Petitioner's establishment from performing in any manner inconsistent with the Ordinance. The trial court issued this injunction, sustained on appeal, although Township presented no evidence of adverse secondary effects. The trial court and the Michigan appellate courts have applied a new standard inconsistent with this Court's decision in O'Brien and its progeny, the "common sense" standard. In Michigan, contrary to Justice O'Connor's opinion in Pap's, a local unit of government may enact an ordinance restraining free speech merely because the township opposes the means by which that speech is communicated.

The Writ of Certiorari should be granted and the decision of the Michigan appellate courts reversed. In the alternative, the Writ of Certiorari should be granted and this matter remanded to the Michigan Supreme Court with instructions that Michigan must comply with the decisions of this Court cited above.

Dated: 9/22/04

Respectfully Submitted,

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ORDER
Entered: June 24. 2004
124831

Michigan Supreme Court
Lansing, Michigan
Marua D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

CHARTER TOWNSHIP OF VAN BUREN,
Plaintiff- Appellee

v.

SC: 124831
COA: 238571
Wayne CC: 00-036479-CZ

GARTER BELT, INC., d/b/a LEGG'S LOUNGE
Defendant- Appellant.

/

On order of the Court, the application for leave to appeal the September 25, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would grant leave to appeal.

80617

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the forgoing is true and complete copy of the order entered at the direction of the Court.

June 24, 2004

STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF VAN BUREN Plaintiff-Appellee,	FOR PUBLICATION September 25, 2003 9:00 a.m.
V.	
GARTER BELT INC., d/b/a LEGG'S LOUNGE, Defendant-Appellant.	No. 238571 Wayne Circuit Court LC No. 00-036479-CZ

Before: Markey, P.J., and Cavanagh and Saad, JJ.

MARKEY, J.

Defendant appeals by right the trial court's order granting plaintiff summary disposition and a permanent injunction enforcing Van Buren Township's ordinance prohibiting nudity at liquor-licensed establishments. Defendant also appeals the denial of its motion to vacate judgment and disqualify the trial judge. We first find no abuse of discretion occurred denying defendant's motion for judicial disqualification and conclude due process does not require disqualification under the totality of the circumstances. We also hold that state law does not preempt the Township's ordinance because we conclude the Legislature did not intend its regulation of nudity at liquor-licensed establishments to change the long-standing broad authority of local governments to regulate liquor trafficking within their jurisdiction. We consider last

defendant's constitutional claims.[1] We hold that both Van Buren Township's ordinance and the permanent injunction are constitutionally valid.

I. Summary of Material Facts and Proceedings

Defendant owns and operates a bar in Van Buren Township that features nude dancing and is licensed by Michigan's Liquor Control Commission. In March, 1999, Van Buren Township enacted ordinance 02-16-99(2) (§6-69 of plaintiff's code of ordinances), which prohibits persons "appearing in a state of nudity" from frequenting, loitering, working, or performing in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. It is not disputed that defendant featured nude dancing long before the adoption of §6-69 and that Van Buren Township's ordinance is worded identically to that part of a Clinton Township ordinance this Court held "constitutionally valid and enforceable" in *Jott, Inc v Clinton Twp*, 224 Mich App 513, 548; 569 NW 2d 841 (1997).

After defendant failed to comply with §6-69, plaintiff sued seeking to enjoin defendant from featuring nude dancing contrary to the ordinance. Defendant answered, and by affirmative defenses and counter-claim, sought to have the ordinance declared unconstitutional. Plaintiff moved for summary disposition, arguing that the ordinance was not a complete ban on nude entertainment, but instead was a valid

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1. We first review nonconstitutional issues "that might obviate the necessity of deciding the constitutional" issues. *Taxpayers of Michigan Against Casinos v Michigan*, 254 mich App 23, 43; 657 NW 2d 503 (2202). See also *People v Riley*; 465 Mich 442, 447; 636 NW 2d 514 (2001)("constitutional issues should not be addressed where the case may be decided on nonconstitutional grounds.").

liquor control ordinance designed to combat known adverse secondary adverse effects associated with the combination of nudity and consumption of alcohol. Defendant argued that nude dancing is a form of expression protected by the First amendment, and that plaintiff improperly enacted its ordinance without proof that defendant's bar caused any adverse secondary effects. Specifically, defendant argued that subsequent decisions of United States Supreme Court superceded *Jott*.

The trial court disagreed that a legislative body must hold an evidentiary hearing to determine whether a proposed ordinance would further a legitimate government interest. Instead, the trial court concluded that a legislative body could consider any material it deems pertinent and may also employ common sense. The court concluded that under the Twenty-first Amendment the State and local units of government have authority to control liquor traffic within their jurisdiction even though such regulation may incidentally impact activity protected by the First Amendment. Finding that the case at bar was controlled by *Jott*, the trial court granted summary disposition to plaintiff and permanently enjoined defendant from violating the ordinance.

On December 28, 2001, this Court denied defendant's motion for a stay of the judgment and injunction, and denied reconsideration on January 9, 2002. On January 23, 2002, our Supreme Court denied defendant's application for leave to appeal. This Court denied defendant's motion for peremptory reversal on April 18, 2002.

II. Judicial Disqualification

We review the trial court's factual findings on a motion for disqualification for an abuse of discretion but the application of the facts to the law is reviewed de novo. *Cain v Dep't of*

Corrections, 451 Mich 470, 503 n 38; 548 NW 2d 210 (1996); *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW 2d 321 (2001).

A judge is disqualified when he cannot hear a case impartially. *Cain, supra* at 503. But a party challenging a judge "must overcome a heavy presumption of judicial impartiality." *Id.* at 497. In general, the challenger must prove a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial. MCR 2.003(B)(1); *Cain, supra* at 495; *Armstrong, supra* at 597. Here the public comments Judge O'Hair purportedly made in 1996 when he was Wayne County Prosecutor do not establish the requisite actual bias or prejudice to overcome the presumption of judicial impartiality.

At the hearing on defendant's motion, Judge O'Hair denied any personal bias or prejudice. He also denied knowing that defendant's owner, who had contributed funds to a "Dump O'Hair" election year effort in 1996, was even involved in this case. Indeed, O'Hair asserted he did not take such matters personally and had "long forgotten" events defendant raised until his motion to disqualify was filed after the court had already ruled. Further, O'Hair affirmed that his decision was controlled by the law, and not by any discretionary fact finding on his part. On de novo review, Chief Judge Sapala found that O'Hair had been "a long-time sitting Judge of the Wayne County Circuit Court, blessed with an impeccable reputation with regard to integrity." Judge Sapala also found that comments attributed to O'Hair as prosecutor five years earlier on public issues were insufficient to demonstrate actual bias in light of O'Hair's impeccable reputation. The Chief Judge's factual findings are reviewed with deference, and the record here does not establish that an abuse occurred in finding that O'Hair was not actually biased or prejudiced. *Cain, supra* at 503.

We also find no merit in defendant's argument that the appearance of bias is too high to be constitutionally tolerated. Due process requires judicial disqualification without showing actual prejudice only in the most extreme cases. *Cain, supra* at 497-498. A showing of actual bias is not necessary to disqualify a judge where "experience teaches that the probability of actual bias...is too high to be constitutionally tolerable." *Crampton v Dept of State,* 395 Mich 347, 351; 235 NW 2d 352 (1975), quoting *Withrow v Larkin,* 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). Our Supreme Court noted such situations include: (1) where the judge has a pecuniary interest in the outcome; (2) where the judge has been the subject of personal abuse or criticism from the party before him; (3) where the judge is enmeshed in other matters involving the complaining party; or (4) where the judge might have prejudged the case because of having previously acted as an accuser, fact-finder, or initial decision-maker. *Crampton, supra* at 351. Although not exclusive, the *Crampton* categories should be narrowly interpreted in light of examples provided by the Supreme Court and are "not to be viewed as catch-all provisions for petitioners desiring disqualification." *Cain, supra* at 500 n 36.

Defendant does not claim that Judge O'Hair held a pecuniary interest in the instant case, but does claim that the other *Crampton* categories apply. But defendant produced only 1996 newspaper reports that defendant's principal owner, who is not a party in the instant case, had been critical of Judge O'Hair's criminal law enforcement activity when he was prosecutor five years earlier. Defendant's owner had also contributed to an anti-O'Hair political fund. According to press reports, O'Hair responded to the attack that he would not be intimidated from enforcing the law. "[T]he mere fact that a judge has been subjected to press criticism in connection with a case or a party does not necessarily require the judge's disqualification." *Cain, supra* at 515, quoting *Illinois v Coleman,* 168 Ill 2d 509, 541; 660 NE 2d 919 (1995). Here,

there was no evidence to contradict Judge O'Hair's claim that he did not know who owned defendant until after rendering his ruling and had not taken long-forgotten criticism personally. Narrowly construed, the *Crampton* personal abuse" category does not apply.

Similarly, *Crampton* categories three and four, narrowly construed, do did not require recusal of Judge O'Hair based on five-year-old activity as prosecutor to enforce the criminal law and public comments related to that activity. Defendant's claims do not demonstrate O'Hair was "enmeshed" with a party in other matters, or that he had prejudged civil enforcement of a township ordinance regulating alcohol-serving establishments. Generally, a prosecutor is not disqualified from future judicial activity unless the judge had directly participated in the same case, MCR 2.003(B)(3), or directly participated in the prosecution of the defendant within the prior two years, MCR 2.003(B)(4). See *People v Williams (After Remand),* 198 Mich App 537, 544; 499 NW 2d 404 (1993), and *People v Delongchamps,* 103 Mich App 151, 156; 302 NW 2d 626 (1981). Also, once hot topics will cool with the passage of time. *Cain, supra* at 515. And, "Prior written attacks upon a judge are...legally insufficient to support a charge of bias or prejudice on the part of a judge toward an author." *Id* at 857.

The totality of the circumstances must be examined to determine if the present case is so extreme that due process requires disqualification without proof of actual bias. *Armstrong, supra* at 598. We conclude the totality of the circumstances, including the suspect timing[2] of the motion after

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2. Although defense counsel claimed to be surprised that Judge O'Hair heard plaintiff's motion for summary disposition on November 30, 2001, the trial court record reflects a September 6, 2001 a scheduling order signed by Judge O'Hair, acting for and in the absence of Judge Jeanne Stempien. The

Judge O'Hair had ruled in plaintiff's favor, *Wayne County Jail Inmates v Wayne County Chief Executive Officer,* 178 Mich App 634, 665; 444 NW 2d 549 (1989), does not establish that the probability of actual bias is so high as to require disqualification without showing actual bias or prejudice. *Id* at 599. Because Judge Sapala did not abuse his discretion by finding that the presumption of judicial impartiality had not been overcome because Judge O'Hair was actually biased or prejudiced, error warranting reversal did not occur.

III. State Law Preemption

We review de novo a trial court's ruling on a motion for summary disposition and its resolution of constitutional issues raised. *Armstrong, supra* at 582. Whether state law preempts plaintiff's ordinance is a question of law involving statutory construction we also review de novo. *Saginaw county v John Sexton Corp,* 232 Mich App 202, 214; 591 NW 2d 52 (1998).

Defendant, relying on *Nadeau v Clinton Twp,* 827 F. Supp 435 (ED Mich, 1992), argues that MCL 41.181 through its definition of "nudity" limits a township to imposing "pasties and G-strings" regulations. Defendant also argues MCL 436.1916(3) divests counties with a population of 95,000 or greater from enacting regulations broader than those found in State law. We disagree. State law does not preempt local regulation of nudity at liquor-licensed establishments because MCL 436.1916(3) expressly states, in part: "this section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." This Court is also bound by *Jott, supra,* at 543-545, which held a

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trial court record also contains a proof of service by mailing the scheduling order to both of defendant's co-counsel on September 17, 2001.

local ordinance identical to plaintiff's neither conflicted with nor was preempted by MCL 41.181. MCR 7.215(I)(1); *Dunn v Detroit Auto Inter-Insurance Exchange,* 254 Mich App 256, 260-261; 657 NW 2d 153 (2002).

The *Jott* Court held that State law did not preempt Clinton Township from adopting an ordinance nearly identical to the one at issue in this case. *Jott, supra* at 543-545. Although MCL 41.181 conferred general authority on townships to regulate public nudity, the ordinance at issue regulated liquor traffic rather than nudity per se. *Jott, supra* at 544. And the Court found evidence that the Legislature did not intend to preempt local regulation because it had "conferred control over alcoholic beverage traffic in this state on the LCC, which...has adopted Rule 436.1409(1),[3] explicitly recognizing the authority of local governmental units to prohibit different types of nudity in establishments holding liquor licenses." *Jott, supra* at 544-545. Further, "it has long been recognized that local communities possess 'extremely broad' powers to regulate alcoholic beverage traffic within their bounds through the exercise of their general police powers, subject to the authority of the LCC when a conflict arises." *Id* at 545, citing *Bundo v Walled Lake,* 395 Mich 679, 700; 238 NW 2d 154 (1976), and *Tally v Detroit,* 54 Mich App 328, 334; 220 NW 2d 778 (1974). So, this Court held that the definition of nudity in MCL 41.181 neither conflicted with nor preempted Clinton Township's ordinance. *Jott, supra* at 545.

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3. 1980 AACS, R 436.1409(1), effective February 3, 1981, provides: "An on-premises licensee shall not allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals or who displays other types of nudity prohibited by statute or local ordinance." The rule has not been amended or repealed since adoption of 1998 PA 58, the Michigan Liquor Control Code, MCL 436.1101, et seq., effective April 14, 1998.

With respect to defendant's argument that MCL 41.181 preempts plaintiff's ordinance, *Jott* is binding precedent on this Court. MCR 7.215(I)(1); *Dunn, supra* at 260-261. Defendant's reliance on *Nadeau, supra,* is misplaced because that case addressed the same Clinton Township ordinance at issue in *Jott.* This Court is not bound by federal decisions interpreting Michigan law. *Ryder Truck Rental, Inc v Auto-Owners Ins Co,* 235 Mich App 411, 416; 597 NW 2d 560 (1999). Moreover, *Nadeau* was vacated by stipulation of the parties. See *Jott, supra* at 522.

But defendant also argues the Legislature codified state liquor laws after *Jott* was decided by adopting 1998 PA 58, effective April 14, 1998. Defendant points to section 916 of the Michigan Liquor Control Code, MCL 436.1101, et seq., which requires liquor licensees to obtain entertainment, dance and topless activity permits. MCL 436.1916. Defendant specifically relies on subsection 3 of section 916 of the MLCC, which provides:

> An on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for and been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95,000 or less. [MCL 436.1916(3).]

Defendant argues that because Van Buren Township is situated in Wayne County with a population of greater than

95,000 the third sentence of subsection 3 removes the specific legislative grant of authority to local governments found in the second sentence. In essence, defendant argues that the State has preempted regulation of nudity in licensed establishments in counties with a population o greater than 95,000 pursuant to the first of four guidelines set forth in *People v Llewellyn,* 401 Mich 314, 322; 257 NW 2d 901 (1977) to determine when the State has preempted local regulation "by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is not direct conflict between the two schemes of regulation." The *Llewellyn* guidelines provide a state regulatory scheme that preempts local regulation: (1) when the state law expressly provides that the state's authority is exclusive; (2) when preemption is implied in legislative history; (3) although generally not sufficient by itself, when the pervasiveness of the state regulatory scheme supports such a finding; and (4) when the nature of the regulated subject matter demands exclusive state control to achieve the uniformity necessary to serve the state's purpose or interest. See *Rental Property Owners Ass'n v Grand Rapids,* 455 Mich 246, 257; 566 NW 2d 514 (1997), and *Llewellyn, supra* at 323-324. Defendant argues the State has expressed its intention in subsection 3 to exclusively occupy the field of regulating nudity in licensed establishments located in large counties. See e.g., *Michigan Coalition for Responsible Gun Owners v Ferndale,* 256 Mich App 401, 413-414; 662 NW 2d 864 (2003)(holding when the Legislature has expressly stated its intent to exclusively occupy a field it is unnecessary to consider the other three *Llewellyn* factors).

Applying well-settled principles of statutory construction, defendant's argument fails. This Court's primary obligation when interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Gladych v New Family Homes, Inc,* 468 Mich 594; 597; 664 NW 2d 705 (2003). We must presume the Legislature intended the meaning clearly

expressed and must enforce a statute as written. *Id.; People v Morey,* 461 Mich 325, 330; 603 NW 2d 250 (1999). Thus, speculation about an unstated legislative purpose must not replace the unambiguous, plain text of a statute. *Gladych, supra.* Where an ambiguity requires interpretation, the statutory language should be construed reasonably, keeping in mind the purpose of the act. *Draprop Corp v Ann Arbor,* 247 Mich App 410, 415; 636 NW 2d 787 (2001).

We cannot accept defendant's speculative claim that the third sentence of MCL 436.1916(3) defeats the explicit expressed intent in the second sentence. *Gladych, supra.* Defendant's construction also contravenes the settled principle that every word, phrase and clause of a statute be given effect. *Morey, supra* at 330. More important, the Legislature is presumed to be aware of long-standing judicial, see *Jott, supra* at 545, and administrative interpretations, see 1980 AACS, R 436.1409(1),[4] upholding local control of nudity in connection with liquor trafficking. *Gordon Sel-Way, Inc v Spence Bros. Inc,* 438 Mich 488, 505; 475 NW 2d 704 (1991); *Consumers Power Co v Dep't of Treasury,* 235 Mich App 380, 388; 597 NW 2d 274 (1999). Although aware of the long-standing administrative and judicial deference to local control, the Legislature did not positively revoke the LCC's long-standing rule, nor disapprove this Court's holding in *Jott.* Rather, the Legislature expressly provided that the adoption of section 916 was "not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." MCL 436.1916(3). Parts of a statute must be read in the context of the entire statute so as to produce a harmonious whole, *Macomb County Prosecuting Attorney v Murphy,* 464 Mich 149, 159; 627 NW 2d 247 (2001), and here, the Legislature granted local units of government the ability to

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4. See footnote 3, supra.

veto any state permit, MCL 436.1916(5). In sum, defendant's interpretation of MCL 436.1916(3) is unreasonable in light of the express language the Legislature used and the long-standing judicial and administrative interpretation approving extremely broad authority of local governments to regulate liquor trafficking. *Jott, supra* at 545.

Although legislative analysis is of limited value in interpreting a statute, *Frank W Lynch & Co v Flex Technologies, Inc.* 463 Mich 578, 587; 624 NW 2d 180 (2001), a reasonable interpretation of the statute consistent with its express language is set forth in House Legislative Analysis, Third Analysis, HB 4454, July 9, 1998. After commenting on the apparent problem addressed by recodification of liquor control laws, the analysis reads: "In addition, some have proposed adding language to the liquor code to allow local governments more authority to regulate topless entertainment." *Id* at p. 1. After summarizing the proposed recodification, the analysis provides, in part:

> In addition to the reorganization of sections, the bill would make the following substantive changes:
>
> The bill would create a topless activity permit for on-premise licensees, in addition to the dance and entertainment permits currently issued under departmental rules...Topless activity would be banned without a topless activity permit in those counties with a population of 95,000 or less. However, a local unit of government would not be prevented from enacting an ordinance to prohibit topless activity or nudity on licensed premises within its jurisdiction. [House Legislative Analysis, Third Analysis, HB 4454, July 9, 1998, p. 4.]

We therefore conclude that the Legislature intended through the express language of MCL 436.1916(3) to continue the long-standing broad authority of local government to regulate liquor traffic within its jurisdiction. Accordingly, we hold that state law does not preempt local regulation of nudity at liquor-licensed establishments.

IV. Constitutional Issues

A. Standard of Review

We review de novo both a trial court's ruling on a motion for summary disposition and resolution of any constitutional issues raised. *Armstrong, supra* at 582. Statutes and ordinances are presumed to be constitutional and the burden to prove otherwise rests with the challenger. *Gora v Ferndale,* 456 Mich 704, 711-712; 576 NW 2d 141 (1998); *People v Boomer,* 250 Mich App 534, 538; 655 NW 2d 255 (2002). Further, we must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent. *City of Owosso v Pouillon,* 254 Mich App 210, 213; 657 NW 2d 538 (2002); *People v Barton,* 253 Mich App 601, 603; 659 NW 2d 654 (2002).

B. Rational Basis Scrutiny of Liquor Regulations

Defendant argues that the trial court erred by applying rational basis scrutiny to liquor control laws as employed by the *Jott* Court in reliance on *California v LaRue,* 409 US 109; 93 S Ct 390; 34 L Ed 2d 342 (1972) and its progeny. *LaRue* held that the Twenty-first Amendment conferred broad powers on the states to regulate sexually explicit entertainment in establishments licensed to sell alcoholic beverages. In particular, defendant argues that *Jott* has been superceded by subsequent decisions of United States Supreme Court, including *44 Liquormart v Rhode Island,* 517 US 484; 116 S Ct 1495;

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134 L Ed 2d 711 (1996), and *City of Erie v Pap's A.M.*, 529 US 277; 120 S Ct 1382; 146 L Ed 2d 265 (2000), which applied intermediate scrutiny established in *United States v O'Brien*, 391 US 367; 88 S Ct 1673; 20 L Ed 2d 672 (1968) for expressive conduct protected by the First Amendment. We disagree. *Jott, supra,* binds this Court. MCR 7.215(I)(1). The United States Supreme Court has not clearly repudiated, either in *44 Liquormart, supra,* or *Pap's, supra,* the underlying premise of *LaRue* and its progeny that a state may, in exercise of its inherent police powers, constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at liquor-licensed establishments.

The Supreme Court in *LaRue, supra,* upheld the constitutionality of California's ban on nudity, and real or simulated sexual acts, in establishments licensed to serve alcohol. The *LaRue* Court observed that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *LaRue, supra* at 114. The Twenty-first Amendment provides, in part: "the transportation or importation into any State...for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." US Const. Am XXI. Although not holding that the Twenty-first Amendment superceded other parts of the United States Constitution, the *LaRue* Court nevertheless concluded that "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened." *LaRue, supra* at 115. The Court also concluded that California's determination that the "sale of liquor by the drink and lewd or naked dancing and entertainment" should not occur in the same place was rational. *Id* at 116, 118. And the Court reasoned that although some of the banned performances "are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board." but rather "has

merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id* at 116, 118. Thus, the *LaRue* Court held that California's ban on "bacchanalian revelries" at liquor-licensed establishments did not violate the United States Constitution "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires." *Id* at 118-119.

The Supreme Court affirmed its holding in *LaRue* in at least three subsequent decisions: *Doran v Salem Inn, Inc,* 422 US 922; 95 S Ct 2561; 45 L Ed 2d 648 (1975); *New York State Liquor Authority v Bellanca,* 452 US 714; 101 S Ct 2599; 69 L Ed 2d 357 (1981); and *City of Newport, Kentucky v Iacobucci,* 479 US 92; 107 S Ct 383; 93 L Ed 2d 334; (1986). In *Doran,* the Court upheld a preliminary injunction against enforcement of a local ordinance that banned topless dancing not only in bars but also in any public place. The Court summarized *LaRue* held "that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." *Doran, supra* at 932-933. But because the ordinance was not limited to bars and no other legitimate state interest was suggested to counterbalance the constitutional protection presumptively afforded to activities within the scope of the ordinance, the preliminary injunction was properly issued. *Id* at 933-934.

In *Bellanca, supra,* the Supreme Court considered a challenge based on the First Amendment to a New York law banning nude dancing at establishments licensed to sell liquor for consumption on the premises. The Court reviewed its decisions in *LaRue* and *Doran*, and concluded that the State of New York had done just what the Court had said a state could do. *Bellanca, supra,* at 717. The Court reasoned that because New York possessed the power to ban the sale of alcoholic

beverages entirely it could also ban the sale of liquor on premises where topless dancing occurs. *Id.* While not requiring legislative findings to support the ban, the Court found them in a legislative memorandum that included the observation that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Id* at 718. So, the Court held that New York had "chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption." *Id.* The Court concluded New York's policy choice did not violate the United States Constitution given the "'added presumption in favor of the validity of the state regulation' conferred by the Twenty-first Amendment." *Id.*, quoting *LaRue, supra* at 118.

In *Iacobucci,* the City of Newport, Kentucky, enacted an ordinance that prohibited nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises. A challenge to the ordinance under the First and Fourteenth Amendments failed in federal district court. *Id.* at 92-93. The Sixth Circuit Court of Appeals reversed, 785 F 2d 1354 (1986), finding that *Bellanca* did not apply because in Kentucky local voters, not the City or the Commonwealth, determine whether alcohol may be sold. *Iacobucci, supra* at 94. The Supreme Court disagreed, finding *Bellanca* controlled because the Commonwealth's authority under the Twenty-first Amendment extended to the City. *Iacobucci, supra* at 94. The Court opined:

> In holding that a State "has broad power...to regulate the times, places, and circumstances under which liquor may be sold," *Bellanca,* 452 US, at 715, this Court has never attached any constitutional significance to a State's division of its authority over alcohol. The Twenty-first Amendment has given broad power to the States

and generally they may delegate this power as they see fit. [*Iacobucci, supra* at 96; footnote omitted.]

This Court, relying on *LaRue* and *Bellanca,* applied rational basis scrutiny to a First Amendment challenge to a Clinton Township ordinance identical in pertinent parts to plaintiff's ordinance. *Jott, supra* at 538. The *Jott* Court found that the parts of the Clinton Township ordinance identical to Van Buren Township's ordinance were rationally related to the legitimate governmental interest of eradicating the effects of "undesirable behavior" stemming from a combination of alcohol and nudity. *Id* at 545-546. Quoting *Bellanca, supra* at 718. After severing invalid parts of the ordinance, this Court held "the remainder of the ordinance constitutionally valid and enforceable. *Id* at 548.

In *44 Liquormart, supra,* the Supreme Court held that Rhode Island's statutory prohibition against advertisements containing accurate information about retail prices of alcoholic beverages was invalid because it abridged speech protected by the First Amendment. *Id* at 488. The *44 Liquormart* Court held that the Twenty-first Amendment did not shield the ban on commercial speech from constitutional scrutiny.[5] *Id* at 488, 516. The Court also limited its decision in *LaRue.* "Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment." *44 Liquormart, supra* at 516. The Court reasoned that because the Twenty-first Amendment did not diminish other provisions of

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5. A decade before the Supreme Court decided *44 Liquormart,* this Court held that a ban on advertising liquor prices was an unconstitutional restraint on commercial speech not shielded by the Twenty-first Amendment. *Michigan Beer & Wine Wholesaler Ass'n v Attorney General,* 142 Mich App 294; 370 NW 2d 328 (1985).

the United States Constitution, including the Supremacy clause, the Establishment Clause, or the Equal Protection clause, it would not diminish the First Amendment. *Id.* Nevertheless, the court opined that "[e]ntirely apart from the Twenty-first amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* Moreover, a state's inherent police powers "provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *Id.*

In *Jott,* this Court specifically rejected defendant's argument that *44 Liquormart* requires a higher level of scrutiny than rational basis when reviewing a state's exercise of its police powers under the Twenty-first Amendment to regulate appropriate places to sell alcohol. The *Jott* Court opined:

> We reject plaintiff's claim, asserted at oral argument, that the holding in *LaRue* was recently overruled by the Supreme Court in *44 Liquormart, Inc v Rhode Island,* 517 US 484; 116 S Ct 1495; 134 L Ed 2d 711 (1996). Unlike this case, *44 Liquormart* was a "commercial speech" case. It involved a challenge to a state law banning advertisement of retail liquor prices. The Supreme Court expressly noted that laws suppressing speech are subject to greater constitutional scrutiny than laws suppressing forms of conduct. Although the Supreme Court did retreat somewhat from its position in *LaRue,* it did so only insofar as *Larue* advanced the proposition that the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment may be shielded from attack by virtue of the Twenty-first Amendment. Indeed,

> the court expressly stated that it was not questioning its holding in *Larue*. The court noted that *LaRue*, unlike the case before it, was not a commercial speech case, but instead concerned the regulation of nude dancing where alcohol was served. The Court expressly stated that its analysis in *LaRue* would have yielded the same result, independent of the Twenty-first Amendment, in light of the state's ample inherent powers to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of sexual activities described in *LaRue*. For these reasons, we find that *44 Liquormart* does not affect the disposition of this case. [*Jott*, *supra* at 539 n 6.]

Jott is binding on this court. MCR 7.215(I)(1); *Dunn, supra* at 260-261.

We also reject defendant's claim that the Supreme Court's decision *Pap's A.M.; supra,* requires a different result because *Pap's* did not address the issue of where alcohol may be sold but rather concerned a general community-wide ban on nudity similar to that considered in *Doran, supra*. Thus, *Pap's* does not call into question the State's exercise of its police power to "prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, supra* at 515; *Jott, supra* at 539 n 6.

Defendant's argument is also not supported by *City of Los Angeles v Alameda Books, Inc*, 535 US 425; 122 S Ct 1728; 152 L Ed 2d 670 (2002). That case addressed whether Los Angeles could rely upon a 1977 study of crime to justify its zoning restrictions on adult entertainment businesses (prohibiting them within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park). *Id* at 430-

433, 441. The Supreme Court in *Alameda Books* intended to clarify the standard of review for content-neutral time, place, and manner regulations designed to combat adverse secondary effects of businesses that purvey sexually explicit materials. *Id* at 433-434; *Renton v Playtime Theatres, Inc.*, 475 US 41, 49-50; 89 L Ed 2d 29; 106 S Ct 925 (1986). Content-neutral time, place, and manner regulations are constitutionally valid if they are "designed to serve a substantial governmental interest and [allow] for reasonable alternative avenues of communication." *Id.; Jott, supra* at 529.

The plurality in *Alameda Books* concluded that Los Angeles could rely on its 1977 study because it supported the city's theory that a concentration of adult operations in one locale attracts crime. *Id* at 442. The Court reasoned that a governmental unit is entitled to rely on "any evidence that is 'reasonably believed to be relevant' for demonstration a connection between speech and a substantial, independent government interest." *Id* at 438, citing *Renton, supra* at 51-52, and *Barnes v Glenn Theatre, Inc*, 501 US 560, 584; 111 S Ct 2456; 115 L Ed 2d 504 (1991) (Souter, J., concurring in judgment). The government meets its burden if the evidence relied upon fairly supports its rationale. *Alameda Books, supra* at 438. If a challenger fails to cast direct doubt on the government's rationale of the government or by furnishing evidence that disputes the government's factual findings, the municipality meets the *Renton* standard. *Alameda Books, supra* at 438-49. If the challenger is successful in raising doubt about the government's rationale, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id* at 439. Importantly, the plurality did not address whether the government must actually consider the evidence supporting its rationale before adopting the regulation. *Id* at 442. Rather, the Court left intact its prior holding that the government may support its rationale with studies of the experience of other

governments, and on court opinions addressing the same topic. See *Renton, supra* at 51-52.

So, even if plaintiff were required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication, it would have met its burden. Plaintiff could reasonably rely upon the finding adopted by the Supreme Court and by this Court that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca, supra,* 452 US at 718; *Jott, supra* at 546.

Furthermore, Bryce Kelley, the township planner responsible for drafting the ordinance testified by deposition that his understanding of the experience of other communities in separating alcohol and nudity was that it created a better community. "A city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Alameda Books, supra* at 444 (Kennedy, J., concurring), quoting *Young v American Mini Theatres, Inc.,* 427 US 50, 71; 96 S Ct 2440; 49 L Ed 2d 310 (1976) (plurality opinion). Kelley also testified that he compared the number of police runs to defendant's bar with the number of police runs to a strip mall containing no adult entertainment and found thirty percent more police runs to defendant's business. Although Kelley testified he did not present this information to the township board before adoption of the ordinance, the township clerk at the time recalled Kelley discussing the issue when the ordinance was being considered.

More importantly, Kelley testified that he sought assistance from a consulting company, McKenna Associates, that prepared a report for the township board concerning several ordinance revisions, including ordinance 02-16-99(2),

which regulated sexually oriented businesses. The McKenna report, based on studies from a number of municipalities, summarized adverse secondary effects of sexually oriented business, including topless bars:

> These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, such businesses can dramatically change the character of the community because of noise, liter, and illicit activities generated by them. [Deposition of Bryce Kelley, exhibit 2, McKenna report, p. 1.]

In summary, we hold that the trial did not err by applying rational basis scrutiny to plaintiff's ordinance and finding that it was constitutionally valid and enforceable. *Jott, supra* at 545-548. Moreover, MCR 7.215(I)(1) requires this Court to follow *Jott, supra.* Under *LaRue* and its progeny, as modified by *44 Liquormart,* a state may exercise its inherent police powers and constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at liquor-licensed establishments. "[T]he State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, supra* at 555. Finally, even if we apply intermediate level scrutiny to plaintiff's ordinance we still ind it a constitutional content-neutral time, place, and manner regulation designed to combat adverse secondary effects of the combination of alcohol and nudity that allows for reasonable alternative avenues of communication. *Iacobucci, supra* at 96-97; *Jott, supra* at 527, 545-546.

C. A Disputed Material Fact Issue Does Not Require A Trial

Defendant also argues that there is no evidence in the

record of adverse secondary effects from defendant's business and that it presented evidence that there are no adverse secondary effects from adult entertainment in general, or from defendant's business in particular. At a minimum, defendant argues, that a sufficient question of fact existed concerning secondary effects to avoid granting summary disposition. We disagree.

A municipality may adopt an ordinance to address its concern that adverse effects it reasonably believes may occur to the community in the future. In *Jott, supra* at 528-529, this Court rejected the claim that Clinton Township had not justified its zoning ordinance restricting locations of adult entertainment uses "because, at the time the ordinance was enacted, not a single adult use existed in the township and because defendant never conducted its own independent study regarding the impact of adult uses in the community." The *Jott* panel relied upon *Renton, supra,* where the Supreme Court upheld the constitutionality of a zoning ordinance restricting adult motion picture theaters opining:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities...in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. [*Jott, supra* at 529, quoting *Renton, supra* at 51-52.]

In both *Renton* and *Jott* the municipality considered the experience of other cities with adult entertainment business. *Renton, supra* at 50; *Jott, supra* at 529. Further, the Supreme

Court held that the city of Renton could rely on the "detailed findings" of adverse secondary effects of adult entertainment business in an appellate decision[6] addressing the type of ordinance at issue. *Renton, supra* at 51. In *Pap's, supra,* the plurality recognized that the city of Erie's ordinance prohibiting public nudity (effectively banning nude dancing without pasties and G-strings) was aimed at combating crime and other negative secondary effects "which we have previously recognized are 'caused by the presence of even one such' establishment." *Pap's, supra* at 291, quoting *Renton, supra* at 47-48, 50. The Court observed that "[e]ven in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing." *Pap's supra* at 297, citing *Nixon v Shrink Missouri Government PAC,* 528 US 377, 393 n 6; 120 S Ct 897; 145 L Ed 2d 886 (2000) (applying "exacting scrutiny" and upholding Missouri's campaign finance legislation against First Amendment challenge). And the Court noted that *O'Brien, supra,* which applied intermediate scrutiny to federal legislation banning draft card burning, "required no evidentiary showing at all that the threatened harm was real." *Pap's, supra* at 299. Clearly, plaintiff was not required to demonstrate that nude dancing in establishments selling alcohol caused adverse secondary effects by conducting an empirical study in the community before adopting its ordinance.

We also reject defendant's argument that an affidavit by its expert, Dr. Daniel Linz, cast sufficient doubt on studies finding adverse secondary effects from adult entertainment businesses to create an issue of material fact requiring trial. Dr. Linz opined that "there is absolutely no *properly* conducted studies or research that establish or demonstrate that exotic

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6. *Northend Cinema, Inc v Seattle,* 90 Wash 2d 709; 585 P 2d 1153 (1978)

dance clubs which serve alcoholic beverages engender *sufficient* 'secondary effects' so as to warrant the enactment" of plaintiff's ordinance."[7] Dr. Linz also noted his work was submitted to the Supreme Court in *Pap's, supra,* in an amicus curiae brief, and that Justice O'Connor (plurality opinion), and Justice Souter (concurring and dissenting) commented on it. In that regard, Justice O'Connor wrote: "In *Nixon*, however, we flatly rejected that idea [to require an empirical study to support the city's conclusion concerning adverse secondary effects]...(noting that the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government)." *Pap's, supra* at 300, citing and quoting *Nixon, supra* at 394. Moreover, as already discussed, this Court held in *Jott* that a rational basis exists for banning nudity from establishments licensed to sell alcohol. No further evidentiary showing by plaintiff was necessary in this case where plaintiff's ordinance and the one this Court held to be "constitutionally valid and enforceable" were, in pertinent part, identical. *Jott, supra* at 548.

D. An Injunction Enforcing Plaintiff's Ordinance is Not A "Prior Restraint"

Defendant next argues that the issuance of a permanent injunction is an unconstitutional prior restraint of First Amendment protected expression. We disagree.

"Any system of prior restraints on expression bears a heavy presumption against its constitutional validity." *City of Cadillac v Cadillac News & video, Inc,* 221 mich App 645, 649; 562 NW 2d 267 (1997), citing *Bantam Books, Inc v Sullivan,* 372 US 58, 70; 83 S Ct 631; 9 L Ed 2d 584 (1963). The term

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[7] Affidavit of Dr. Daniel Linz, ¶ 9, exhibit D, defendant's response to plaintiff's motion for summary disposition (emphasis added).

"prior restraint" is used to describe an administrative or judicial order that forbids certain communications in advance of the time that the communications are to occur. *Alexander v United States,* 509 US 544, 550; 113 S Ct 2766; 125 L Ed 2d 441 (1993). Temporary restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints. *Id.* Prior restraints usually arise in efforts by the government to suppress obscenity. See e.g., *Cadillac News & Video, supra.* In *Freedman v Maryland,* 380 US 51, 58-59; 85 S Ct 734, 13 L Ed 2d 649 (1965) the Supreme Court held that the First Amendment required procedural safeguards to guard against suppression of protected speech when attempting to ban unprotected speech. The *Freedman* Court held unconstitutional a state system for the licensing of movies, holding "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id* at 58. To pass constitutional muster a prior restraint of unprotected expression must meet three conditions:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured. [*Southeastern Promotions, Ltd v Conrad,* 420 uS 546, 560; 95 S Ct 1239; 43 L Ed 2d 448 (1975), summarizing *Freedman, supra.*]

Defendant relies upon *Vance v Universal Amusement Co,* 445 US 308; 100 S Ct 1156; 63 L Ed 2d 413 (1980) to support the argument that the injunction here is a prior restraint.

In *Vance*, the Supreme Court held unconstitutional a Texas statute as authorizing an invalid prior restraint because it permitted enjoining the future showing of films that had not yet been found to be obscene when a movie theater had exhibited obscene films in the past. *Id* at 316. The Court held the fact that a Judge had issued the injunction in *Vance* did not save the statute from constitutional infirmity, and "the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against motion picture exhibitors." *Id* at 317.

Although being "in a state of nudity" is not an inherently expressive condition," *Pap's, supra* at 289, nonobscene nude dancing may be a form of expression falling within the outer limits of protection by the First Amendment, *Jott, supra* at 526, citing *Barnes, supra* at 565-566. On the other hand, the First Amendment does not protect nude dancing involving lewd, sexual activity. *Michigan ex rel Wayne Co Prosecutor v Dizzy Duck*, 449 Mich 353, 360-361, 365; 535 NW 2d 178 (1995). So a censor's effort to ban nude dancing because it is obscene may experience difficulties separating nonobscene expressive conduct from obscene nude dancing. Defendant's argument fails because neither plaintiff's ordinance nor the injunction at issue here totally bans nude dancing because it is obscene: the ordinance and the order to comply with the ordinance only prohibit nude dancing at the same place that liquor is sold. *Jott, supra* at 538. The "critical fact is that [the ordinance and the injunction enforcing it] has not forbidden [nude dancing] across the board." *Id.*, quoting *LaRue, supra* at 118.

In *Danish News Co v Ann Arbor*, 517 F Supp 86 (ED Mich, 1981), affirmed without opinion 751 F 2d 384 (CA 6, 1984), former Justice Boyle, then United States District Judge, declined to entertain the plaintiff's constitutional challenge to

the city of Ann Arbor's zoning ordinance restricting locations of "adult entertainment business." Finding the zoning ordinance constitutional, the state trial court granted Ann Arbor a preliminary injunction because plaintiff's business, an adult bookstore, was a nonconforming use that constituted a nuisance per se. *Id.* at 88. This Court and our Supreme Court denied the plaintiff's application for leave to appeal. *Id.* Like defendant argues here, the plaintiff argued that *Freedman, supra,* together with *Vance, supra,* "require the conclusion that where a nuisance per se statute is applied to first amendment activity an injunctive order in accordance with the statute is a prior restraint." *Danish News, supra* at 92. But Judge Boyle found that enjoining a violation of Ann Arbor's zoning ordinance was materially distinguished from the nuisance statute in *Vance,* which was aimed at obscenity, because the statute in *Vance* "presented the usual problem of discerning the fine line between obscenity which is not protected by the first amendment [sic] and...material which does not meet the definition of obscenity and, therefore, enjoys first amendment protection." *Danish News, supra* at 93. In contract, a zoning ordinance "does not purport to forbid display or sale of obscenity but rather defines a particular type of business which may admittedly have first amendment protection and simply regulates the location of the business." *id.* Thus, Judge Boyle opined:

> Because the zoning ordinance does not rely on the fine line between obscenity and protected first amendment material, certain of the reasons for the strict safeguards of *Freedman* evaporate. See *Southeastern Promotions, Ltd v Conrad,* 420 US 546, 558-59, 95 S Ct 1239, 1246-47, 43 L Ed 2d 448. The question is rather one of applying the plain terms of the constitutional ordinance to the situation at hand to determine whether the activity of the alleged violator is covered by the zoning ordinance. [*Danish News,*

supra at 93.]

Thus, the instant case is not one where procedural safeguards are invoked because it is not necessary to draw the fine line between obscene and nonobscene nude dancing. The plain terms of plaintiff's constitutional ordinance are simply applied to the undisputed facts, i.e. that defendant provided nude dancing at its liquor-licensed establishment. Enforcement of plaintiff's content-neutral, constitutional ordinance is simply not a prior restraint. In *County of Benton v Kismet Investors, Inc.*, 653 NW 2d 193 (Minn App, 2002), the court affirmed the lower court's finding that the defendant's business offering nude dancing violated the county's zoning ordinance, and therefore, affirmed the issuance of a permanent injunction. The ordinance had previously been held to be a constitutionally valid time, place and manner regulation. *Id* at 194, 198, citing *Kismet Investors, Inc v County of Benton,* 617 NW 2d 85, 93-95 (Minn App, 2000). See also, *Winslow v Sheets,* 261 Neb 203; 622 NW 2d 595 (2001) (upholding the constitutionality of a village ordinance banning totally nude dancing and affirming the issuance of a permanent injunction enforcing the ordinance), and *People v 2896 West 64th Avenue,* 989 P 2d 235 (Colo App, 1999) (upholding issuance of a permanent injunction prohibiting nude entertainment as a nuisance contrary to a local ordinance, previously found constitutional, which regulated places where nude entertainment could be provided). Accordingly, we hold the issuance of an injunction to enforce Van Buren Township's constitutionally valid ordinance does not violate the First Amendment as a prior restraint without procedural safeguards.

E. The Overbreadth Doctrine

Defendant argues that the township's prohibition of nudity in liquor-serving establishments is unconstitutionally overbroad because it bans even plunging necklines and thongs and "legitimate" nude or semi-nude theatrical performances

(*Hair, Oh! Calcutta, Salome,* and *Dance*). Also, defendant notes that the ordinance does not distinguish between male or female nudity and argues the ordinance even extends to exposure of body parts in the restroom of any bar in the township. Defendant contends a ban on nudity must be no greater than necessary to address harmful secondary effects and restrictions beyond "pasties and G-strings" limit the erotic message of dancers and rendering the ordinance overbroad. We disagree.

We review de novo whether a statute or ordinance is unconstitutional under the doctrines vagueness or overbreadth. *Boomer, supra* at 538; *People v Rogers,* 249 Mich App 77, 94; 641 NW 2d 595 (2001). We hold that plaintiff's ordinance is not unconstitutionally overbroad because there is no real and substantial possibility that it will deter others not before the Court from engaging in protected expressive conduct — nude dancing at establishments not licensed to sell liquor. *Id* at 96.

The constitutional doctrines of vagueness and overbreadth both curb arbitrary and discriminatory enforcement but are nonetheless distinct. *Plymouth Charter Township v Hancock,* 236 Mich App 197, 199-200; 600 NW 2d 380 (1999). The doctrines are often considered together because they are closely related, especially where claims of First Amendment violations are raised. *Id.* At 200, citing *Grayned v City of Rockford,* 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972) (a vague statute may deter protected speech). There are three grounds on which a statute may be held to be void because it is vague or overbroad. *Burns v City of Detroit (On Remand),* 253 Mich App 6089, 625; 660 NW 2d 85 (2002), modified 468 Mich 881; 658 NW 2d 468 (2003). A statute may be void for vagueness where: "(1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad

and impinges on First Amendment freedoms." *People v Morey*, 230 Mich App 152, 164; 583 NW 2d 907 (1998), aff'd 461 Mich 325; 603 NW 2d 250 (1999).

A facial challenge to an ordinance on the ground that it is overbroad rests on the "prediction that third parties will refrain from protected expression because of the [ordinance]." *In re Chmura*, 461 Mich 517, 531; 608 NW 2d 31 (2000). But "'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.'" *Id.*, quoting *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984). Moreover, particularly where expressive conduct and not mere speech is involved, "' the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Hill v Colorado*, 530 US 703, 732; 120 S Ct 2480; 147 L Ed 2d 597 (2000), quoting *Broadrick v Oklahoma*, 413 US 601, 615; 93 S Ct 2908; 37 L Ed 2d 830 (1973). See also, *Burns, supra* at 626-627, and *Morey, supra* at 164. But the "'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Rogers, supra* at 96, quoting *Taxpayers for Vincent, supra* at 801.

In analyzing defendant's overbreadth, we note that nudity is not protected expressive conduct, it is erotic nude dancing that is expressive conduct at the outer edges of the protection afforded by the First Amendment. *Pap's, supra* at 289. Also, unlike the city public decency ordinance in *Triplett Grille, Inc v City of Akron*, 40 F 3d 129 (CA 6, 1994), on which defendant relies, plaintiff's ordinance does not ban nudity in all public places. The ban is limited to liquor-licensed establishments, *Jott, supra* at 540. That the ordinance broadly covers both male and female nudity does not imply an infirmity

but rather reinforces the content-neutral aim of the ordinance to "eradicate the effects of 'undesirable behavior' stemming from a combination of alcohol and nudity." *Jott, supra* at 545-456. The "comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill, supra* at 731. And tavern patrons using restroom facilities are generally not engaged in expressive conduct. The plain and legitimate sweep of the ordinance is to regulate trafficking in liquor by applying a prophylactic rule banning sexually explicit entertainment at licensed bars, cabarets or taverns. *Jott, supra at 540, citing* Felix v Young, *536 F 2d 1126, 1132 (CA 6, 1976).* The ordinance simply does not present a real and substantial danger of sweeping within its ambit the presentation of theatrical productions that involve nudity; nor do the other hypothetical situations defendant imagines present a real and substantial danger of chilling protected speech. Accordingly, plaintiff's ordinance is not constitutionally overbroad. *Hill, supra* at 722-723; *Rogers, supra* at 96.

Our conclusion is further supported by the presumption of constitutional validity, *Burns, supra* at 627-628, and by the binding precedent of *Jott, supra.* Plaintiff's ordinance is identical to the ordinance held constitutional in *Jott* after this Court severed parts of the statute not reasonably related to the legitimate governmental interest involved. *Id.* at 548. Although *Jott* did not extensively analyze the overbreadth issue, it reversed the trial court's determination that Clinton Township's ordinance was constitutionally overbroad. *Jott, supra* at 537, 548. Under MCR 7.215(I)(1), the *Jott* Court's rejection of an overbreadth challenge binds this Court.

F. The Vagueness Doctrine

Defendant also argues that plaintiff's ordinance because a person of ordinary intelligence cannot know what is

prohibited, and no guidelines are provided to law enforcement. We again disagree.

"An ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated." *Hancock, supra* at 200. When a statute or ordinance is challenged on the grounds that it is unconstitutionally vague, a court must review the entire text of the law, giving its words their plain ordinary meanings. *Rogers, supra* at 94; *Morey, supra* at 163. An ordinance is not vague if "'it is clear what the ordinance as a whole prohibits.'" *Hill, supra* at 733, quoting *Grayned, supra* at 110. An ordinance provides fair notice when persons of ordinary intelligence have a reasonable opportunity to know what is prohibited. *People v Noble,* 238 Mich App 647, 652; 608 NW 2d 123 (2000). Thus, an ordinance "is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id.*

The plain meaning of the words of the ordinance makes clear to persons of ordinary intelligence that it prohibits "nudity" in "any establishment licensed or subject to licensing by the Michigan Liquor Control Commission." § 6-69, Van Buren Township's code of ordinances. See also *Jott, supra* at 536. Contrary to defendant's argument, a person of ordinary intelligence is not required to guess at the meaning of "nudity." And what the ordinance as a whole prohibits is easily understandable by persons of ordinary intelligence. Laws written in words cannot achieve the precision of a mathematical formula. *Hill, supra* at 733; *Grayned, supra* at 110. But it is clear that the ordinance as a whole prohibits nudity at liquor-licensed establishments. Finally, because the ordinance is not

vague, it does not confer unfettered discretion to those empowered to enforce the ordinance to determine whether it has been violated. *City of Owosso v Pouillon,* 254 Mich App 210, 217; 657 NW 2d 538 (2002); *Hancock, supra* at 200.

H. Due Process

Defendant raises one other constitutional issue in the course of arguing that State law preempts plaintiff's ordinance: that its liquor license, together with entertainment and topless permits, constitute a property interest which cannot be taken without due process of law. Defendant waived this issue because it was not included in defendant's statement of questions on appeal. MCR 7.212(C)(5); *Persinger v Holst,* 248 Mich App 499, 507 n 2; 639 NW 2d 594 (2001). Nevertheless, this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient. *McKelvie v Auto Club Ins Ass'n,* 203 Mich App 331, 337; 512 NW 2d 74 (1994). We briefly address this issue and conclude it has no merit. See e.g., *Joerger v Gordon Food Service, Inc.,* 224 Mich App 167, 172; 568 NW 2d 365 (1997).

Defendant's argument relies on *Bundo, supra,* which held a liquor license holder "has a 'property' interest in the renewal of his liquor license such that before he may be deprived of this interest h must be afforded rudimentary due process." *Id* at 704. Reliance on *Bundo* is misplaced. No denial, non-renewal, or revocation of a liquor license was involved in this case. Instead, Van Buren Township enacted an ordinance pursuant to its broad police powers to protect the health, safety and welfare of the public. While no person may be deprived of life, liberty or property without due process of law, US Const, Am V; const 1963, art 1, sec 17; *Tolksdorf v Griffith,* 464 Mich 1, 7; 626 NW 2d 163 (2001), no one has a vested right to the continuation of an existing law be precluding its amendment or repeal, *Rookledge v Garwood,* 340 Mich 444,

457; 65 NW 2d 785 (1954). A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *City of Detroit v Walker,* 445 Mich 682, 699; 520 NW 2d 135 (1994). But an interest "cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws." *Id.,* quoting *Minty v Bd of State Auditors,* 336 Mich 370, 390; 58 NW 2d 106 (1953). Such is the case here; consequently, defendant's argument fails on the merits.

V. Conclusion

The trial court did not abuse its discretion in finding no basis for judicial disqualification. We also hold that under the totality of the circumstances due process did not require judicial disqualification. We conclude that State law does not preempt Van Buren Township's ordinance. Finally, we hold that Van Buren Township's ordinance is constitutional and enforceable. Accordingly, we affirm the trial court's grant of summary disposition and the issuance of a permanent injunction enforcing the ordinance.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad

ORDER
Entered: January 23, 2002
120762 & (21) (22) (23)

Michigan Supreme Court
Lansing, Michigan
Marua D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

CHARTER TOWNSHIP OF VAN BUREN,
Plaintiff- Appellee

v.

SC: 120762
COA: 238571
Wayne CC: 00-036479-CZ

GARTER BELT, INC., d/b/a
LEGG'S LOUNGE
Defendant- Appellant.

_____/

On order of the Court, the motion for immediate consideration and motion to waive transcript requirement are considered, and they are GRANTED. The application for leave to appeal prior to the decision by the Court of Appeals is also the questions presented should be reviewed by this Court before consideration by the Court of Appeals. The motion for stay of proceedings is also considered , and it is DENIED.

Cavanagh, J., would deny leave to appeal but would issue a stay of proceedings.

Pah:0117

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the forgoing is true and complete copy of the order entered at the direction of the Court.

January 23, 2002

Clerk

Court of Appeals, State of Michigan

ORDER

Charter Township of Van Buren
v The Garter Belt Inc.

Docket No. 238571

LC No. 00-036479-CZ

Jessica R. Cooper
Presiding Judge

Mark J. Cavanagh

Henry William Saad
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion for rehearing of order is DENIED.

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 9, 2002
Date

Chief Clerk

Court of Appeals, State of Michigan

ORDER

Charter Township of Van Buren
v The Garter Belt Inc.

Jessica R. Cooper
Presiding Judge

Docket No. 238571

Mark J. Cavanagh

LC No. 00-036479-CZ

Henry William Saad
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion for stay pending appeal is DENIED.

The motion to waive the transcript requirement of MCR 7.209(A)(3) is DENIED as moot.

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 28, 2001
Date

Chief Clerk

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan municipal corporation,
Plaintiffs/Counter Defendants

vs.

Case No. 00-036479-CZ
Hon. Jeanne Stempien

THE GARTER BELT, INC., A
Michigan corporation, d/b/a LEGG'S LOUNGE
Defendants/Counter Plaintiffs.

_____/

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Allan S. Rubin (P44420)
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Co-Counsel for Defendant/Counter-Plaintiff
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248/356-1220

ORDER

At a session of said Court held in the City of

Detroit, County of Wayne, State of Michigan, on December 20, 2001

PRESENT: HON. MICHAEL E. SAPALA
CHIEF JUDGE, WAYNE COUNTY CIRCUIT COURT

This matter having come before the Court Upon Defendants Motion to Disqualify Visiting Judge, Hon. John D, O'Hair, the Chief Judge having a De Novo review of the Visiting Judges decision to not Disqualify itself from the Proceedings in accordance with MCR 2.003, and the Court being otherwise duly advised in the Premise:

IT IS HEREBY ORDERED that the determination of the Visiting Judge is hereby

___X___ affirmed _____ reversed.

IT IS FURTHER ORDERED that the December 11, 2001 order Granting Summary Disposition to Plaintiff is hereby:

_____ vacated in accordance with the Courts findings as set forth on the record and the Plaintiff's Motion for Summary Disposition shall be reset before the assigned Judge.

___X___ left undisturbed for the reasons set forth on the record.

HON. MICHAEL E. SAPALA
CIRCUIT COURT JUDGE

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY _____
DEPUTY CLERK

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan municipal corporation,
Plaintiffs/Counter Defendants

vs.

Case No. 00-036479-CZ
Hon. Jeanne Stempien

THE GARTER BELT, INC., A
Michigan corporation, d/b/a LEGG'S LOUNGE
Defendants/Counter Plaintiffs.

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Co-Counsel for Defendant/Counter-Plaintiff
24460 Telegraph Road
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ORDER

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan,

on December 14, 2001

PRESENT: HON. JOHN D. O'HAIR
CIRCUIT COURT JUDGE

This matter having come before the Court Upon Defendants Emergency Motion to Vacate Judgement, Disqualify Visiting Judge, or Alternatively for Stay Pending Appeal, the Court having reviewed the Motion by Defendants and the Response of the Plaintiff and having heard oral argument, and otherwise being duly advised in the premise:

IT IS HEREBY ORDERED that Plaintiff Motion to Vacate Judgement is hereby _____granted__√_____denied for the reasons set forth on the record;

IT IS FURTHER ORDERED that Plaintiffs Motion to Disqualify Visiting Judge is hereby ____granted_√___denied for the reasons set forth on the record;

IT IS FURTHER ORDERED that the Plaintiff's Motion for Stay Pending Appeal is hereby ____granted_√___denied for the reasons set forth on the record.

JOHN D. O'HAIR
CIRCUIT COURT JUDGE

JOHN D. O'HAIR
CIRCUIT COURT JUDGE ACTING FOR AND IN THE ABSENCE OF JUDGE JEANNE STEMPIEN

It is further ordered that the stay previously entered is extended until 14 days from today.

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY GA DEPUTY

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan municipal corporation,
Plaintiffs/Counter Defendants

vs.

00-036479 CZ 11/06/00
JDG: JEANNE STEMPIEN
VAN BUREN CHARTER TWP O
vs
THE GARTER BELT INC

THE GARTER BELT, INC., A
Michigan corporation, d/b/a LEGG'S LOUNGE
Defendants/Counter Plaintiffs.

_____/

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Allan S. Rubin (P44420)
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24460 Telegraph Road
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_____

JUDGMENT AND PERMANENT INJUNCTION

At a session of said Court held in the City of
Detroit, County of Wayne, State of

Michigan, on DEC 11 2001

PRESENT: HON. JOHN D. O'HAIR
Circuit Court Judge

This matter having come before the Court on November 30, 2001 upon the Motion for Summary Disposition of the Plaintiff and Counter-Defendant, the Court having considered the briefs of the parties, heard argument, being otherwise fully advised in the premises and for the reasons set forth on the record;

IT IS HEREBY ORDERED that Plaintiff and Counter-Defendant Charter Township of Van Buren hereby has a judgment in its favor based on the Court finding that the ordinance in question is without constitutional or legal infirmity and that the Court has the statutory authority to abate a nuisance, which it has done in this action.

IT IS HEREBY FURTHER ORDERED that Defendant and Counter-Plaintiff The Garter Belt, Inc. d/b/a Legg's Lounge hereby is permanently enjoined from violating in any manner or form the Charter Township of Van Buren's ordinance entitled Nudity on Licensed Premises, Ordinance No. 02-16-99(2), adopted March 11, 1999.

IT IS HEREBY FURTHER ORDERED that, for the reasons stated fully on the record, the Plaintiff and Counter-Defendant's Motion for Summary Disposition is granted, and the counterclaims of the Defendant and Counter-Plaintiff are dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED that action to enforce this judgment is stayed for a period is entered. This Judgment resolves the last pending claim and closes the case.

JOHN D. O' HAIR
Circuit Court Judge

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY

Court Judge

ACTING FOR AND IN THE ABSENCE OF
JUDGE JEANNE STEMPIEN

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF
WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan municipal corporation,
Plaintiffs/Counter Defendants

00-036479-CZ 11/08/00
JDG: STEMPIEN JEANNE
VAN BUREN CHARTER TWP OF
vs
THE GARTER BELT INC

vs.

THE GARTER BELT, INC., A
Michigan corporation, d/b/a LEGG'S LOUNGE
Defendants/Counter Plaintiffs.
_____/

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Allan S. Rubin (P44420)
Rubin & Rubin, PLLC
Co-Counsel for Defendant/Counter-Plaintiff
24460 Telegraph Road
Southfield, Michigan 48034
248/356-1220

_____

ORDER GRANTING PLAINTIFF LEAVE TO AMEND COMPLAINT

At a session of said Court held in the City of

Detroit, County of Wayne and State of Michigan on: FEB 20, 2001

PRESENT: Hon. SUSAN BIEKE NEILSON
Circuit Court Judge

This matter having come before the Court upon the stipulation of the parties, by and through their respective counsel, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiff Charter Township of Van Buren is granted leave to file an amended Complaint requesting, in addition to the relief already requested, injunctive relief in the form of a preliminary injunction.

SUSAN BIEKE NEILSON
Circuit Court Judge

Notice and hearing on entry
of the above order is waived:

Circuit Court Judge

ACTING FOR AND IN THE ABSENCE OF
JUDGE JEANNE STEMPIEN

David J. Szymanski (P40734)
Attorney for Plaintiff

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY CA DEPUTY CLERK

Allan S. Rubin (P44420)
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation
Plaintiff,

vs. Case No. 00-CV-75395
Hon: GEORGE CARAM STEEH

THE GARTER BELT, INC.
a Michigan corporation d/b/a
LEGG'S LOUNGE
Defendant.
_____/

ORDER REMANDING CASE TO WAYNE COUNTY CIRCUIT COURT FOR LACK OF SUBJECT MATTER JURISDICTION AND DENYING PLAINTIFF'S MOTION TO REMAND AS MOOT

Defendant The Garter Belt, Inc. was ordered on December 19, 2000 to show cause why this case should not be remanded to the Wayne County Circuit Court for lack of federal subject matter jurisdiction. Plaintiff Charter Township of Van Buren seeks injunctive relief to enforce Township Ordinance Section 6-69 prohibiting a nude person from frequenting, loitering, working for or performing in any establishment regulated by the Michigan Liquor Control Commission, and further prohibiting a proprietor or operator of such an establishment from allowing such conduct. Defendant removed the one count complaint from state court on December 13, 2000 invoking federal question jurisdiction under 28 U.S.C. §§ 1331 and 1441, and civil rights jurisdiction under 28 U.S.C. § 1443.

As explained in the order to show cause, federal question jurisdiction arises under 28 U.S.C. § 1331 and 28 U.S.C. § 1441 only when a federal question is presented on the face of the plaintiff's complaint. See Berlin Charter Township v Proud, No 95-CV-73561, 1995 WL 871011, *1 (ED Mich Sept 13, 1995) (J. Zatkoff) (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)). Conversely, defenses arising under federal law do not ordinarily confer federal jurisdiction. Id. (citing Caterpillar, Inc., 482 U.S. at 393). Here, analogous to the situation in Proud, Township seeks injunctive relief to enforce a Township ordinance regulating adult entertainment. Township's claims are not removable, even though federal questions may be implicated, because the nature of the claims is to enforce the Ordinance under state law. Id, at *2. See also Township of Greenwich v Mobile Oil Co., 504 F. Supp 1275, 1277-1278 (D.N.J. 1981). Defendant's attempts to distinguish Proud and township of Greenwish are not persuasive. To the extent the First Amendment is implicated as a defense, such a defense does not give rise to federal jurisdiction. Proud, 1995 WL 871011 at *1. Township has not plead a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.[1] Contrary to defendant's argument, "[s]exual discrimination in speech and in employment" is not "an essential element" of Township's claim for injunctive relief, but in fact a defense to the claim.

Removal under 28 U.S.C. § 1443 is limited to cases involving enforcement of equal rights with respect to racial equality. Appalachian Volunteers, Inc v. Clark, 432 F. 2d 530, 534 (6th Cir. 1970). Defendant has not come forward to demonstrate that Township's claims involve a denial of equal

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1. Title VII applies to claims of unlawful employment discrimination. Even to the extent title VII could possibly apply here, at best, the federal statute is raised only by defendant as a possible defense i.e. that the Ordinance forces defendant to engage in discriminatory employment practices by requiring defendant to hire only male dancers to perform "topless."

rights based on race. The court need not address the remaining issue of the timing of the removal.

Defendant has failed to show cause why this action should not be remanded to the Wayne County Circuit Court for lack of federal subject matter jurisdiction. Accordingly,

IT IS ORDERED that this matter is hereby REMANDED to the Wayne County Circuit Court, Plaintiff Charter Township of Van Buren's motion for remand is hereby DENIED as MOOT.

SO ORDERED.

GEORGE CARAM STEEH
United States District Judge

GEORGE CARAM STEEH
United States District Judge

18 JAN 2001

Dated: _____
Detroit, Michigan.

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY _____ DEPUTY CLERK

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan municipal corporation,
Plaintiff

vs. Case No. 00- -CZ
Hon.

THE GARTER BELT, INC., A
Michigan corporation, d/b/a LEGG'S LOUNGE
Defendants.
_____/

Patrick B. McCauley (P17297)
David J. Szymanski (P40734)
Sommers, Schwartz, Silver & Schwartz, P.C.
Attorneys for Plaintiff
2000 Town Center, Suite 900
Southfield, Michigan 48075
248/355-0300
_____/

ORDER TO SHOW CAUSE

At a session of said Court held in the City of Detroit, County of Wayne and State of Michigan on: November 7, 2000

PRESENT: Hon. JEANNE STEMPIEN
Circuit Court Judge

Upon a filing and reading of the Plaintiff's Complaint Seeking Injunctive Relief, Affidavit of Helen Foster and Plaintiff's Ex Parte Motion to Show Cause and for Permanent Injunction and the Court being otherwise fully advised in the

premises;

IT IS HEREBY ORDERED that Defendant the Garter Belt, Inc. d/b/a Legg's Lounge shall appear on Dec. 1., 2000 at 9:00 a.m. in the Wayne County Circuit Court courtroom of the Honorable JEANNE STEMPIEN to show cause, if any, why the Court should not issue a permanent injunction enjoining the Defendant from allowing female topless dancing in a state of nudity as described in pertinent ordinances enacted by the Plaintiff while serving alcoholic beverages to patrons and further enjoining the Defendant from engaging in any business constituting a sexually oriented business on its premises without first securing the required sexually oriented business licenses from the Plaintiff Township.

IT IS HEREBY FURTHER ORDERED that this Order to Show Cause shall be served personally and by mail upon the resident agent for Defendant The Garter Belt, Inc. at least _____days before the hearing scheduled by this Order.

JEANNE STEMPIEN
Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan Municipal Corporation,
Plaintiff, Case No. 00- CZ
Hon.

vs.

THE GARTER BELT INC., a Michigan
Corporation, d./b/a Legg's Lounge,
Defendant

_____/

PATRICK B. McCAULEY (17297)
DAVID J. SZYMANSKI (P40734)
Sommers, Schwartz,
Silver & Schwartz P,C.
Attorneys for Plaintiff
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complain that is either pending or was previously filed and dismissed, transferred or otherwise disposed of after having been assigned to a judge in this court.

COMPLAINT SEEKING INJUNCTIVE RELIEF

NOW COMES Plaintiff Charter Township of Van Buren, by and through its attorneys Sommers, Schwartz, Silver & Schwartz, P.C., and for its Complaint against the above - named Defendant, states unto this Honorable Court as follows:

COMMON ALLEGATIONS

1. At all times material hereto, Plaintiff Charter Township of Van Buren was a Michigan Municipal Corporation located in the County of Wayne and State of Michigan.

2. At all times material hereto, Defendant The Garter Belt, Inc. was a Michigan corporation doing business as Legg's Lounge located, conducting business and with its registered office and principal place of business in the City of Belleville, County of Wayne and State of Michigan.

3. The residence agent of Defendant The Garter Belt, Inc. is John Hamilton located at 50778 Michigan Ave. Belleville, MI 48111.

4. The Court has jurisdiction over this matter specifically because of the equitable nature of the relief requested.

5. Venue is proper in this Court pursuant to MCL § 66.1621 (a)

COUNT 1
REQUEST FOR INJUNCTIVE RELIEF

6. The Plaintiff hereby realleges and reaffirms each and very allegation contained in paragraphs 1 through 5 of this Complaint as though fully set forth therein.

7. Defendant The Garter Belt, Inc. doing business as Legg's

Lounge operates am adult entertainment establishment located at 50778 Michigan Ave., Belleville, MI, 48111 that does now feature topless female dancers.

8. Defendant The Garter Belt's Legg's Lounge is a business establishment that serves alcoholic beverages to patrons and is an establishment licensed or subject to licensing by the Michigan Liquor Control Commission. (MLCC)

9. Pursuant to USCA Cons. Amend. 21, MCLA Const. Art. 4, Sec. 40 and MCLA 436.1(2), local communities within the State of Michigan, including Plaintiff Charter Township of Van Buren, are, within the proper exercise of their police powers, granted the power to control alcoholic beverage traffic within their boundaries, despite the fact that the State of Michigan also has granted the power to control alcoholic beverage traffic on a statewide basis to the MLCC.

10. Effective March 11, 1999, Plaintiff Charter Township of Van Buren properly adopted a series of zoning and other ordinances related to the licensing and operation of what are known as sexually oriented businesses (SOBs) within the boundaries of the Plaintiff Township.

11. Both prior to and after the adoption of the aforesaid ordinances, Defendant The Garter Belt's Legg's Lounge has featured topless female dancers, and, as a result, the Defendant's Legg's Lounge is an SOB within the meaning of the aforesaid SOB ordinances adopted by Plaintiff Charter Township of Van Buren.

12. Ordinance 02-16-99(2) effective on March 11, 1999 that amended The Code of Ordinances of the Charter Township of Van Buren by adding ordinance section 6-69 entitled Nudity on Licensed Premises
(Exhibit A) at Subsection (1) provides as follows:

> No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or preform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

13. The topless female dancers performing at Defendant The Garter Belt's Legg's Lounge are appearing in a state of nudity as defined by Ordinance 02-16-99(2) of the Charter Township of Van Buren through section 6-69 at Subsection (2) and are in violation of the aforesaid ordinance.

14. By allowing topless female dancers to performat its Legg's Lounge, Defendant The Garter Belt, Inc. is in violation of Ordinance 02-16-99(2) of the Charter Township of Van Buren through section 6-69 at Subsection (1).

15. On August 29,2000, Bryce Kelley, Director of Development for Plaintiff Charter Township of Van Buren, sent a letter to John Hamilton, the resident agent and owner/operator of Defendant The Garter Belt, Inc., notifying Mr. Hamilton of the existence of the aforesaid ordinance, notifying the Defendant of its continuing violation of the ordinance in question and directing the Defendant to comply with the requirements of the subject ordinance.

16. Despite receiving the aforesaid notice of ordinance violation, and despite other efforts to have Defendant The Garter Belt, Inc. comply with the subject ordinances, the Defendant has failed and otherwise refused to comply with

the ordinances of the Plaintiff in question and is in continuing and flagrant violation of the same.

17. The continuing and flagrant violation by Defendant The Garter Belt, Inc. of the aforesaid ordinance is causing irreparable harm to the citizens of Plaintiff Charter Township of Van Buren and is undermining the Plaintiff's ability to address undesirable secondary and other effects stemming from the combination of alcohol consumption and public nudity.

18. As direct and proximate result of the aforesaid wrongful conduct of Defendant The Garter Beltnc., the citizens of Plaintiff Charter Township of Van Buren are being subjected to and will continue to be subjected to irreparable harm for which there is no adequate remedy at law.

19. This Court, in the exercise of its equitable powers, may enter whatever orders it deems appropriate to prevent the Defendant from violating the ordinance that it the subject of this action and to prevent the operation of Legg's Lounge in a manner that causes irreparable harm to the citizens of Plaintiff Charter Township of Van Buren.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court enter it's Order permanently enjoining the Defendant from allowing female topless dancing in a state of nudity as described in the subject ordinances while serving alcoholic beverages to patrons.

SOMMERS, SCHWARTZ,
SILVER & SCHWARTZ, P.C.

By:_____
DAVID J. SZYMANSKI (P40734)
Attorneys for Plaintiff
2000 Town Center, Suite 900

Southfield, MI 48075
(248) 355-0300

Dated: November 2, 2000

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN, A Michigan Municipal Corporation,
Plaintiff

vs.

Case No. 00-036479CZ
Hon. Jeanne Stempien

THE GARTER BELT, INC., A Michigan Corporation d/b/a Legg's Lounge,
Defendant
_____/

Patrick B. McCauley (P17297)
David J. Szymanski (P40734)
Sommers, Schwartz, Silver & Schwartz, P.C.
Attorneys for Plaintiff and Counter-Defendant
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Allan S. Rubin (P44420)
Rubin & Rubin, PLLC
Co-Counsel for Defendant and Counter-Plaintiff
24460 Telegraph Rd.
Southfield, MI 48034
(248) 356-1220

DEFENDANT'S ANSWER TO COMPLAINT

NOW COMES, the Defendant, GARTER BELT, INC., by and through its attorneys, Shafer & Associates, P.C., and the law firm of Rubin & Rubin, P.L.L.C., in Answer to Plaintiff's Complaint, states as follows:

COMMON ALLEGATIONS

1. In response to paragraph number 1 of Plaintiff's Complaint, Defendant admits.
2. In response to paragraph number 2 of Plaintiff's Complaint, Defendant admits.
3. In response to paragraph number 3 of Plaintiff's Complaint, Defendant admits.
4. In response to paragraph number 4 of Plaintiff's Complaint, Defendant neither admit nor deny for want of sufficient information to form a belief as to the truth of the allegations.
5. In response to paragraph number 5 of Plaintiff's Complaint, Defendant neither admit nor deny for want of sufficient information to form a belief as to the truth of the allegations.

COUNT I
REQUEST FOR INJUNCTIVE RELIEF

6. THE Defendant hereby realleges and re-affirms its answer to paragraphs 1 through 5 above as though fully set forth herein word by word, and paragraph by paragraph.
7. In response to paragraph number 7 of Plaintiff's Complaint, Defendant neither admits nor denies the allegations contained therein as the terms "adult entertainment establishment", are an undefined and ambiguous term. However, to the extent that Plaintiff's Complaint alleges that Defendant presents topless performance dance activity at its location, Defendant

admits.

8. In response to paragraph number 8 of Plaintiff's complaint, Defendant admits.

9. In response to paragraph number 9 of Plaintiff's Complaint, Defendant denies in the manner and form alleged and in further answer to paragraph number 9 state that any such regulations set forth therein cannot act to deprive persons of other lawful constitutional rights.

10. In response to paragraph number 10 of Plaintiff's Complaint, Defendant denies in the manner and form alleged as untrue.

11. In response to paragraph number 11 of Plaintiff's Complaint, Defendant neither admits nor denies the allegations contained therein, and leaves Plaintiff to its strict proofs thereof.

12. In response to paragraph number 12 of Plaintiff's Complaint, Defendant admits that such ordinance was adopted. However, to the extent that Plaintiff alleges that this ordinance may be lawfully applied against this Defendant or any other party, Defendant denies as untrue.

13. In response to paragraph number 13 of Plaintiff's Complaint, Defendant denies in the manner and form alleged.

14. In response to paragraph number 14 of Plaintiff's complaint, Defendant neither admits nor denies the allegations contained therein as they lack specific information to form a belief thereto, and leaves Plaintiff to its strict proofs thereof.

15. In response to paragraph 15 of Plaintiff's Complaint, Defendant neither admits nor denies the allegations contained therein as they lack specific information to form a belief thereto, and leaves Plaintiff to its strict proofs thereof.

16. In response to paragraph number 16 of Plaintiff's

Complaint, Defendant denies the allegations as specifically plead as being untrue.

17. In response to paragraph number 17 of Plaintiff's complaint, Defendant denies as untrue.

18. In response to paragraph number 18 of Plaintiff's complaint, Defendant denies as untrue.

19. In response to paragraph number 19 of Plaintiff's complaint, Defendant denies the allegations as specifically plead as being untrue.

WHEREFORE, Defendant respectfully asks this Honorable Court to enter an Order denying the relief requested by the Plaintiff herein, and award Defendant costs, interest and attorney fees so wrongfully incurred.

Respectfully Submitted,
SHAFER & ASSOCIATES, PC
By:_____/s/_____
Bradley J. Shafer P36604
Attorney for Defendant
3800 Capital City Blvd. #2
Lansing, MI 48906
517/886-6560

RUBIN & RUBIN, PLLC
By:_____/s/_____
Allan S. Rubin P 44420
Co-Counsel for Defendant
24460 Telegraph Road
Southfield, MI 48034
248/356-1220

Dated: November 29, 2000

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN, A Michigan Municipal Corporation,
Plaintiff

vs.

Case No. 00-036479CZ
Hon. Jeanne Stempien

THE GARTER BELT, INC., A Michigan Corporation d/b/a Legg's Lounge,
Defendant
_____/

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Co-Counsel for Defendant and Counter-Plaintiff
24460 Telegraph Rd.
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(248) 356-1220

AFFIRMATIVE DEFENSES

NOW COMES, the Defendant, GARTER BELT, INC., by and through its attorneys, Shafer & Associates, P.C., and the law firm of Rubin & Rubin, P.L.L.C., in Answer to Plaintiff's Complaint, states as follows:

1. Notice is hereby given that pursuant to England v. Louisiana Board of Medical Examiners, 375 US 411, 11 L.ed 2d 440; 84 S.Ct. 461 (1964). Defendant hereby reserves its right to litigate any and all claims and/or defenses based upon federal law, whether statutory or constitutional, including claims and defenses based upon Defendant's rights under the United States Constitution, in a federal forum.
2. That Plaintiff has failed to state a claim upon which relief can be granted.
3. That the Plaintiff's ordinance is preempted by MCL § 41.181 and is therefore unenforceable.
4. That the Plaintiff's ordinance is preempted by MCL § 436.1916(3), and is therefore unenforceable.
5. That the Plaintiff's ordinance is violative of Article I, Section 5 of the Michigan Constitution.
6. That the Plaintiff's ordinance is violative of the equal protection clause of Article I, Section 2 of the Michigan Constitution.
7. That the Plaintiff's ordinance violates the Assembly clause of Article I, Section 3 of the Michigan Constitution.
8. That the Plaintiff's ordinance violates Article I, Section 5 of the Michigan Constitution.
9. That the Plaintiff's ordinance violates Plaintiff's rights to Due Process as secured by Article I, Section 17 of the Michigan Constitution.
10. That the Plaintiff's ordinance is vague and overbroad contrary to Article I, Sections 5 and 17 of the Michigan Constitution.
11. That the Plaintiff's ordinance is invalid as it impairs

vested rights of the Defendant to engage in the presentation of constitutionally protected performance dance entertainment as its duly licensed liquor license establishment, contrary to Article I, Section 17 of the Michigan Constitution.

12. That the Plaintiff's ordinance violates the Liquor Control Commission's constitutionally mandated "complete control" of the trafficking of alcoholic beverages within the State of Michigan as conferred upon the Liquor Control Commission pursuant to Article IV, Section 40 of the Michigan Constitution.

13. That the Plaintiff's ordinance acts as a prior restraint on constitutionally protected speech contrary to Article I, Section 5 of the Michigan Constitution.

14. That the Plaintiff's ordinance is unconstitutional as it imposes "unconstitutional conditions" on Plaintiff's rights to engage in expressive performance dance activity contrary to Article I, Section 5 of the Michigan Constitution.

15. That the plaintiff's ordinance is unconstitutional as it is contrary to Article I, Sections 5 and 17 of the Michigan Constitution in that it does not further a substantial governmental interest, is not narrowly tailored to such governmental interest, and is greater than necessary to further any governmental interest is alleged.

16. That the Plaintiff's ordinance is unconstitutional as it is contrary to Article I, Sections 5 and 17 of the Michigan Constitution in that the ordinance is not based on substantial material justification for the severe restrictions imposed on constitutionally protected activity.

17. That the Plaintiff's ordinance is unconstitutional as it unduly restricts Plaintiff's rights to offer expressive performance dance activities at its location and it impermissibly restricts the contents of such activities contrary to Article I, Section 5 of the Michigan

Constitution.

18. That the Defendant ordinance was enacted upon an improper basis contrary to the Michigan Constitution.

19. That, Defendant reserves the right to add further and additional affirmative defenses as same become known through the course of discovery

Respectfully Submitted,
SHAFER & ASSOCIATES, PC
By:_____/s/_____
Bradley J. Shafer P36604
Attorney for Defendant
3800 Capital City Blvd. #2
Lansing, MI 48906
517/886-6560

RUBIN & RUBIN, PLLC
By:_____/s/_____
Allan S. Rubin P 44420
Co-Counsel for Defendant
24460 Telegraph Road
Southfield, MI 48034
248/356-1220

Dated: November 29, 2000

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,
Plaintiffs/Counter- Defendants Case No. 00-036479-CZ
Hon. Jeanne Stempien

vs.

THE GARTER BELT INC., a Michigan corporation, **d./b/a LEGG'S LOUNGE,**
Defendants/Counter-plaintiff.
_____/

PATRICK B. McCAULEY (17297)
DAVID J. SZYMANSKI (P40734)
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Co-Counsel for Defendant/Counter-Plaintiff
24460 Telegraph Road
Southfield, Michigan, 48034
248/356-l22O

COUNTER- COMPLAINT

Now comes the Defendant/Counter- Plaintiff, The Garter Belt, Inc., d/b/a Leggs Lounge (hereinafter " Legg") by and through it attorney's Shafer & Associates PC. and The Law Firm of Rubin & Rubin P.L.L.C and for its Counter Complaint against the Plaintiff/Counter Defendant, the Charter Township of Van Buren (hereinafter" the Township") states as follows:

PARTIES AND JURISDICTION

I.. That at all times relevant hereto the Plaintiff was and is a duly authorized corporation, having its principle place of business in the Township of Van Buren, County of Wayne, State of Michigan.

2. That the Defendant Township is a duly authorized Michigan Municipal Corporation located in the County of Wayne, State of Michigan and is a person amenable to suit pursuant to 42 USC 1983, et seq.

3. That venue is proper in this judicial circuit as all parties reside or conduct conductt business in this circuit and all events relevant here to occurred over in this judicial circuit.

4. That this Court has jurisdiction over this matter by virtue of 42 USC 1983, MCL 600.605, and MCR 2.605.

5. That Plaintiff claim for attorney fees and costs

in grounded upon 42 U.S.C. 1988

FACTUAL BACKGROUND

6. That Plaintiff hereby realleges and re-affirms paragraph one through six above as fully stated herein, word by word, and paragraph by paragraph.

7. That on March 2 1999, the TOWNSHIP passed Ordinance 2-16-99(2) entitled "Nudity on a Licensed Premises. This Ordinance unconstitutionally attempts to prohibit nudity on a premise licensed by the Michigan Liquor Control Commission and provide criminal penalties for violation thereof.

8. That Ordinance 2-16-99 (2) adds Section 6-69 to the Van Buren Township Ordinance. This Ordinance states as follows:

See, 6-69. Nudity on Licensed Premises.

(1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

(2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly including but not limited to exposure, see through clothing articles or body stockings:

(a) the whale or part of the pubic region;

(b) the whole or part of the anus;

(c) the whole or part of the buttocks;

(d) the whole or part of the genitals;

(e) the breast area including nipple, or more than one half of the area of the breast.

(3) Every word, sentence, clause and provision of this section is hereby declared to be severable, and if any word, sentence, clause provision or part thereof is declared to be invalid by a court of competent jurisdiction, the remaining provisions shall not be affected.

(4) The provisions of any or all code sections or subparts thereof in conflict herewith are repealed only to the extent necessary to give this section full force and effect.

(5) The provisions of this section shall become effective upon its passage by the Van Buren Charter Township Board of Trustees and upon publication in accordance with the Township

Charter and the statutes of the State of Michigan

9. That the Plaintiff has for many years been presenting what is commonly, referred to as topless performance dance activities at it's premises and desires to continue to do so in the future.

10. Plaintiff presently holds all permits necessary from the Michigan Liquor Control Commission ("MLCC") to operate such a facility and has held such permits for many years, including a class C liquor license with a entertainment permit with dressing rooms. Plaintiff has in the past and desires in the future to present constitutionally protected performance dance activities including, topless and/or fully nude performance dance entertainment at it's facility.

11. That the TOWNSHIP has not objected to the licensure by the MLCC in any year in which the Plaintiff has received such license.

12.. That Plaintiff has expended significant time, money and resources since the date of licensure in the operation, management, repair, advertising, and promotion of its business.

13. That Plairrtiff's business is located in Wayne County, Michigan, a County in excess of 95,000 persons.

14. That the Defendant has threatened to and in

fact has taken action to enforce the above named Ordinance against the Plaintiff herein. That said action, both threatened and as undertaken has been taken under the color of law and on behalf of the Defendant TOWNSHIP.

15. That the actions of the Defendant are intended to and in fact will impose a prior restraint on constitutionally protected activity, will have the effect of significantly chilling First Amendment activity, will make it economically, impossible for Plaintiff to remain in business and for entertainers to earn a living, will result in a loss of Plaintiff's employees, customers and entertainer rights to engage in constitutionally protected speech, to lawfully earn a living and will violate the free speech, free expression, free association, due process, equal protection and privacy rights created under the United States Constitution.

16. That the actions of the Defendant in passing the above references Ordinances are preempted by MCL 41.181 (4) and MCL 436.1916.

COUNT I
VIOLATION OF 42 USC 1983

I 7. That Plaintiff hereby re-alleges and re-affirms paragraphs one through forty as if fully stated herein, wordy by word, and paragraph by paragraph

18. That the Plaintiff is a corporation engaged in

interstate commerce within the TOWNSHIP OF VAN BUREN1 County of Wayne, and State of Michigan.

19. That the above cited Ordinance is unconstitutional in whole and/or part, alone and/or in combination with one another both facially as applied and in violations of the First and Fourteenth Amendment rights under the United States Constitution and Plaintiff's corollary rights under the Michigan Constitution including but not limited to, Plaintiffs rights as secured by Article I, Section 5, Section 11, Section 16 and Section 17 in that:

(a) They a act as a prior restraint on constitutionally protected activities, contrary to the First and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

(b) They fail to provide for the procedural guarantees required under Freedman v. Maryland 380 U.S. 51 (1965) and FW/PBS v. Dallas 483 U.S. 215 (1990).

(c) They violate the First and Fourteenth Amendments to the United States Constitution in that it fails to require prompt

judicial review or require prompt determination of an adverse determination by the approving authorities.

(d) They are not a content neutral law of general applicability but rather is an impermissible content based on restriction.

(e) They are overboard in it's application to constitutionally protected activities and in violates Renton v. Playtime Theatres 475 U.S. 41 in that it fails to offer a reasonable opportunity to open and operate an adult business.

(f) They violate P1aintiff's constitutional rights to free speech and it not narrowly tailored and is overboard in it's restrictions on constitutionally protected speech contrary to the First and Fourteenth Amendments to the United States Constitution and further violates Plaintiff's Fourteenth Amendment rights to engage in a lawful occupation and attempts tp impose " unconstitutional conditions" in obtaining a license to engage in constitutionally protected activities which in and of itself

is a violation of th First and Fourteenth Amendments of the United States Constitution.

(g) They violate Plaintiffs equal protections rights under the Fourteenth Amendment in the that it unconstitutionally discriminates against adult businesses based upon the content of their speech and further, it creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Michigan by allowing standards to vary from county to county, city to city, township to township and therefore , permits differing treatment amongst individuals who desire to engage in constitutionally protected speech.

(h) They fail to further substantial governmental interests and the Ordinance provisions are greater than essential to further those interests.

(i) They violate the occupational liberty interests of the P1aintiff and its employees, as well as entertainers, by impermissibly restriction occupational activities.

(j) They impermissibly single out the First Amendment Protected businesses from discriminatory business regulations.

(k) They violate the First Amendment rights of entertainers and patrons by placing such restrictions on conduct that it is impossible for them to clearly communicate with one another.

(l) They violate the First and Fourteenth Amendment to the United States Constitution by placing, restrictions on the contents of performance dance entertainment.

(m) They constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments.

(n) They violate the substantive and procedural due rights of Plaintiff and others similar situated.

(o) They contain regulations prohibiting dance entertainment which are overboard and are in violation of the First and Fourteenth Amendments of the United States Constitution

(p) They contain dance restriction requirements which violated the First and Fourteenth Amendments in that they impermissibly retrain dance activities and they impermissibly deny entertainers a right to a lawful living and further violate the right of lawful association protected under the First Amendment of the United States Constitution

(q) The ordinances were not enacted upon a proper basis, do not further an important governmental interest, and are contrary to state law

(r) The Ordinances are unconstitutional in that they fail to provide for prompt judicial review.

20. That any action taken by the TOWNSHIP to enforce the Ordinance against the Plaintiff herein will be taken under a color of law and will deprive Plaintiff of its constitutional rights as set forth herein and will cause irreparable harm to the Plaintiff for which damages are an adequate remedy as a matter of law.

21. That Plaintiff has a substantial likelihood of success on the merits in regard to the constitutional claims; that the public interest

weighs in favor of preventing depravation of constitutional rights; and that any balancing of harms between the parties weighs in favor of the Plaintiff and against the Defendant in its attempts to enforce a clearly and hopelessly flawed unconstitutional Ordinance.

22. That the actions of the TOWNSHIP in enforcing and in threatening to enforce this Ordinance have caused and will continue to cause constitutional depravations to Plaintiff herein .

COUNT II
PREEMPTION UNDER STATE LAW

23. That Plaintiff hereby re-alleges and re-affirms paragraph one through twenty- two above as if fully stated herein, word by word and paragraph by paragraph.

24. That the Ordinance, in so far as they conflict with MCL 41.181 and 436.1916(3), are preempted by state law and are therefore unenforceable.

25. That the Ordinances are in conflict with the Liquor Control Commissions constitutionally mandated "complete control" of the trafficking of alcoholic beverages within the State of Michigan and are therefore unconstitutional contrary to Article 4, Section 40 of the Michigan Constitution and are unenforceable.

COUNT III
ACTION FOR INJUNC1IVE RELIEF

26. That Plaintiff hereby re-alleges and re-affirms paragraphs one through twenty-five above as if fully stated herein, word by word, and paragraph by paragraph.

27. For the reasons set forth above, and to preclude Plaintiff from being denied its rights under the Michigan Constitution, Plaintiff requests the following injunctive relief:

A. Enter an Order of this Court prohibiting Counter-Defendant, its employees, agents and representatives as well as all others who receive actual constructive notice from enforcing VAN BUREN TOWNSHIP Ordinance 2-16-99 (2);

B. Enter and Order of this Court compelling Defendant to take no action to enforce the aforementioned Ordinance against the Plaintiff herein;

C. Enter an Order granting further injunctive and/or equitable relief as this Court may deem just, fair and necessary under the circumstances.

COUNT IV
ACTION FOR DECLARATORY RELIEF

28. That Plaintiff hereby re-alleges and re-affirms paragraph one through twenty-seven above as if fully stated herein word by word and paragraph by paragraph.

29. That this Court has authority to declare the rights and other relations of the Plaintiff and the Defendant hereto.

30. That this Court should declare that the TOWNSHIP'S Ordinance is unconstitutional and in violation of Plaintiff's First and Fourteenth Amendment rights under the United States Constitution and the corollary rights under the Michigan Constitution.

31. That this Court should declare that the TOWNSHIP'S Ordinance is preempted by state law.

32. That this Court should declare that the Defendant's Ordinances are an unconstitutional prior restraint on constitutionally protected expression.

33. That this Court should declare that the TOWNSHIP'S Ordinances impose unconstitutional conditions in violation of th First and Fourteenth Amendments to the United States Constitution on businesses wishing to engage in constitutionally protected speech.

34. That this Court should declare that the TOWNSHIP'S Ordinances are unconstitutional in that if unconstitutionally restricts Plaintiff's , it's employees, customers and entertainers liberty rights to engage in a lawful occupation and/or to enjoy lawful entertainment.

35. That this Court should declare that the Ordinances, as applied to Plaintiff herein is unconstitutional in its entirely, alone or in combination thereof, in violation of the First and Fourteenth Amendments to the United States Constitution.

36. That this Court should declare that the Ordinance alone and/or in combination are unconstitutional in that they fail to require prompt judicial review of an adverse licensing decision.

37. That this Court should declare that the Ordinances are unconstitutional and violative of Plaintiffs rights under the First Amendment to freely associate and/or engage in a lawful occupation.

38. That this Court should declare that the Ordinances were not supported by evidence justifying the restrictions on speech related activities and therefore are unconstitutional and are unrelated to an important Government intent and are not narrowly tailored.

39. That this Court should declare that the

Ordinances in whole or part violates various provisions of the United States Constitution, the Michigan Constitution and Michigan statutory law and are therefore unenforceable.

40. That this Court should declare that prohibitions on nudity are unconstitutionally overboard and unduly restrictive and therefore unconstitutional.

41. That this Court should declare that the Ordinances were passed in violation of Plaintiff's procedural and substantive due process rights and have resulted in a taking of private property without just compensation.

42. That this Court should declare that the Ordinances are unconstitutional, contrary to the United States Constitution and the Michigan Constitution for some, all or part of the reasons set forth in paragraph 19 and are therefore unenforceable.

COUNT V
ACTION FOR ATTORNEY FEES

43. That Plaintiff hereby re-alleges and re-affirms paragraphs one through Forty-two above as if fully states herein, word for word, and paragraph by paragraph.

44. That Plaintiff as prevailing party in the aforementioned mater is entitled to recover actual attorney fees and costs pursuant to 42 U.S. C. 1988 in seeking to have the

aforementioned Ordinances declared unconstitutional.

WHEREFORE. Plaintiff asks this Honorable Court to enter a judgment in favor of Plaintiff and against Defendant including:

A. A declaration that Ordinance No. 2-l6-99 (2), 2-16-is unconstitutional both facially and as applied to Plaintiff herein and are in violation of First, and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

B. A declaration that the Ordinances preempted by state law.

C. Enter a preliminary and permanent injunction enjoining the Defendant, including its officers, agents, employees and representatives and all persons acting through or for them from enforcing upon or implementing Ordinances Nos. 2-16-99 (2)

D. Award Plaintiff its reasonable attorney fees and costs incurred herein pursuant to 42 U.S.C.

F. Enter such other relief in law

and equity that this Court deems just and proper in the circumstances.

Respectfully Submitted,

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517/886-6560

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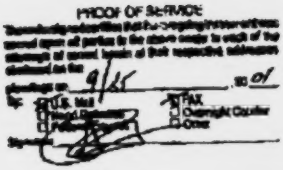
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WAYNE

CHARTER TOWNSHIP OF VAN
BUREN, A Michigan Municipal Corporation,
Plaintiff and Counter- Defendant,

vs.

THE GARTER BELT, INC., A
Michigan Corporation d/b/a Legg's Lounge,
Defendant and Counter-Plaintiff.
_____/

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(248) 356-1220

PLAINTIFF'S ANSWER TO COUNTER-COMPLAINT AND AFFIRMATIVE DEFENSES

NOW COMES Plaintiff and Counter-Defendant Charter Township of Van Buren, by and through its attorneys, Sommers, Schwartz, Silver & Schwartz, P.C., and, for its Answer Counter-Complaint in the above-captioned matter states as follows:

PARTIES AND JURISDICTION

1. In answering paragraph I , the Plaintiff and Counter-Defendant admits the allegations contained therein.

2.. In answering paragraph 2, the Plaintiff and Counter-Defendant admits the allegations contained therein.

3. In answering paragraph 3, the Plaintiff and Counter-Defendant admits the allegations contained therein.

4. In answering paragraph 4, the Plaintiff and Counter-Defendant admits the allegations contained therein and, by way of further answer, states that jurisdiction over this action is before this Court pursuant to rulings and orders of the U.S. District Court for the Eastern District of Michigan, Southern Division.

5. In answering paragraph 5, the Plaintiff and Counter-Defendant denies that the claim for attorney fees is well grounded upon 42 USC

988 but admits that the claim for attorney fees is premised on 42 USC 1988.

FACTUAL BACKGROUND

6. The Plaintiff and Counter-Defendant hereby incorporates by reference its answers to paragraphs 1 through 5 of this Answer to Counter-Complaint as though fully set forth herein.

7. In answering paragraph 7, the Plaintiff and Counter-Defendant denies the allegations contained therein for the reason that the subject ordinance was not "passed" on March 2, 1999 as alleged, and the subject ordinance is not unconstitutional.

8. In answering paragraph 8, the Plaintiff and Counter-Defendant admits only that the Defendant and Counter-Plaintiff reproduces by its allegations the subject ordinance which, itself, is the best evidence of what it states.

9. In answering paragraph 9, the Plaintiff and Counter-Defendant admits only that the Defendant and Counter-Plaintiff operates a topless bar licensed by the Michigan Liquor Control Commissions known as Legg's Lounge in Van Buren Township, and, as a result, is engaged in an activity prohibited by the subject ordinance.

10. In answering paragraph 10, the Plaintiff and Counter-Defendant denies the allegations contained therein for the reason that the Defendant and Counter-Plaintiff does not have

and has made no application for a sexually oriented business (SOB) license as required by Van Buren Township, and it is denied that the Defendant and Counter-Plaintiff desires to present "constitutionally protected performance dance activities" as alleged.

11. In answering paragraph 11 , the Plaintiff and Counter-Defendant can neither admit nor deny the allegations contained therein, having insufficient knowledge upon which to plead, and, pursuant to MCR 2.111(C)(3), leaves the Defendant and Counter-Plaintiff to its proofs.

12. In answering paragraph 12, the Plaintiff and Counter-Defendant can neither admit nor deny the allegations contained therein, having insufficient knowledge upon which to plead, and, pursuant to MCR 2.111(C)(3), leaves the Defendant and Counter-Plaintiff to its proofs.

13. In answering paragraph 13, the Plaintiff and Counter-Defendant admits the allegations contained therein.

14. In answering paragraph 14, the Plaintiff and Counter-Defendant denies the allegations contained therein for the reason that, in actuality, the Plaintiff and Counter-Defendant simply has filed an action in this Court of which the present Counter-Complaint is a part seeking to have this Court enter its order enjoining the Defendant and Counter-Plaintiff from continuing in its violation of the subject ordinance.

15. In answering paragraph 15, the Plaintiff and

Counter-Defendant denies the allegations contained therein as untrue.

16. In answering paragraph 16, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

COUNT I
VIOLATION OF 42 USC 1983

17. The Plaintiff and Counter-Defendant hereby incorporates by reference its answers to paragraphs I through 16 of this Answer to Counter-Complaint as though fully set forth herein.

18. In answering paragraph 18, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

19. In answering paragraph 19, including subparts (a) through (r), the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

20. In answering paragraph 20, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

21. In answering paragraph 21 , the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue, especially since the subject ordinance is precisely the same as one enacted in another Michigan Township that, upon appellate review, has been found to be constitutionally compliant in all

respects.

22. In answering paragraph 22, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

COUNT II
PREEMPTION UNDER STATE LAW

23. The Plaintiff and Counter-Defendant hereby incorporates by reference its answers to paragraphs 1 through 22 of this Answer to Counter-Complaint as though fully set forth herein.

24. In answering paragraph 24, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue, especially for the reason that the ordinance in question does not conflict with state law and was adopted in specific compliance with state law

25. In answering paragraph 25, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

COUNT III
ACTION FOR INJUNCTIVE RELIEF

26. The Plaintiff and Counter-Defendant hereby incorporates by reference its answers to paragraphs 1 through 25 of this Answer to Counter-Complaint as though fully set forth herein.

27. In answering paragraph 27, the Plaintiff and Counter-Defendant denies that the Defendant and Counter-Plaintiff is entitled to any injunctive relief, including, but not limited to that requested in subparagraphs A., B. and C. as alleged.

COUNT IV
ACTION FOR DECLARATORY RELIEF

28. The Plaintiff and Counter-Defendant hereby incorporates by reference its answers to paragraphs 1 through 27 of this Answer to Counter-Complaint as though fully set forth herein.

29. In answering paragraph 29, the Plaintiff and Counter-Defendant admits the allegations contained therein.

30. In answering paragraph 30, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

31. In answering paragraph 31 , the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

32. In answering paragraph 32, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

33. In answering paragraph 33, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

34. In answering paragraph 34, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

35. In answering paragraph 35, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

36. In answering paragraph 36, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

37. In answering paragraph 37, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

38. In answering paragraph 38, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

39. In answering paragraph 39, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

40. In answering paragraph 40, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

41. In answering paragraph 41 , the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

42.. In answering paragraph 42, the Plaintiff and Counter-Defendant denies the allegations contained therein as untrue.

COUNT V
ACTION FOR ATTORNEY FEES

43. The Plaintiff and Counter-Defendant hereby incorporates by reference its answers to paragraphs I through 42 of this Answer to Counter-Complaint as though fully set forth herein.

44. In answering paragraph 44, the Plaintiff and Counter-Defendant denies that the Defendant and Counter-Plaintiff is a prevailing party in this action, denies that the Defendant and Counter-Plaintiff is or will be entitled to any attorney fees and denies that the Defendant and Counter-Plaintiff is or will be entitled to any relief from this Court, including, but not limited to, that requested in subparagraphs A., B., C., D. and F. (sic) as alleged.

SOMMERS, SCHWARTZ,
SILVER & SCHWARTZ P.C

By:_____
David J. Szymanski
Attorneys for Plaintiff,
and Counter-Plaintiff
2000 Town Center, Suite 900
Southfield, Michigan 48075
(248) 355-0300

Dated: October 5, 2001

AFFIRMATIVE DEFENSES

Please be advised that, at the time of trial or before, Plaintiff and Counter-Defendant Charter Township of Van Buren will assert Affirmative Defenses to the Defendant and Counter- Plaintiffs Counter-Complaint that include, but are not necessarily limited to, the following:

1. The Counter-Plaintiff fails to state claims upon which relief can be granted, and the Counter-Defendant is entitled to summary judgment in its favor as a matter of law.

2. There are no genuine issues as to any material fact as to the claims of the Counter- Plaintiff, and the Defendant is entitled to summary judgment as a matter of law.

3. The Counter-Plaintiff has suffered no cognizable injury at all -- most certainly no injury as the result of any constitutional violations -- and, as a result, the Counter-Plaintiffs claims are premature and are not ripe for adjudication.

4. The Counter-Plaintiff has suffered no cognizable injury because neither the US nor Michigan constitutions guarantee or provide for the so-called constitutional rights alleged by the Counter-Plaintiff

5. There is no controversy existing between the Counter-Plaintiff and the Counter- Defendant that is suitable for adjudication.

6. The Counter-Plaintiff has not been required to pay any compensible attorney fees or costs in

any way attributable to the Counter-Defendant.

7. To the extent that Counter-Plaintiff asserts equitable claims, those claims are barred by the doctrines of waiver, estoppel, unclean hands and laches.

8. The claims of the Counter-Plaintiff are barred by the applicable statute of limitations.

9. The Counter-Plaintiff has not plead and cannot establish any elements, circumstances or injuries required to warrant the injunctive and other relief it requests.

10. The Counter-Defendant's actions or regulations complained of by the Counter-Plaintiff were not designated or intended to nor do they improperly suppress protected expression.

11. The Counter-Defendant's actions or regulations complained of by the Counter-Plaintiff were and/or are proper regulations designed to address adverse secondary effects.

12. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint is not an unconstitutional prior restraint.

13. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint provides all necessary and reasonable procedural safeguards, avenues for prompt judicial review and does not impinge upon due

process rights.

14. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint provides necessary and reasonable access to prompt review of adverse determinations under the ordinance.

15. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint is content neutral and constitutionally compliant in all respects.

16. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint is narrowly tailored to further a substantial and compelling governmental interest.

17. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint does not impose unconstitutional conditions.

18. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint does not violate privacy or any First or Fourteenth Amendment rights.

19. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint does not violate equal protection requirements.

20. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint is not vague, overbroad or unduly restrictive regarding the lowest possible order of protected "speech."

21. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint does not provide unbridled discretion in local governmental officials or governing bodies.

22. The sole ordinance that is the subject of Counter-Plaintiffs Counter-Complaint constitutes the proper exercise of the Defendant's police power under both the US and state constitutions.

23. The sole ordinance that is the subject of the Counter-Plaintiffs Counter-Complaint is not pre-empted by state statutes or state law and is the proper exercise of local governmental authority granted under state statutes.

26. The sole ordinance that is the subject of the Counter-Plaintiffs Counter-Complaint not constitutionally infirm on an either facial or as-applied basis.

27. The sole ordinance that is the subject of the Counter-Plaintiffs Counter-Complaint dos not impinge upon clear communication or speech and does not adversely or impermissibly effect occupational liberty interests, anyone's right to make a living or association rights.

28. The sole ordinance that is the subject of the Counter-Plaintiffs Counter-Complaint does not constitute any form of taking without just compensation in violation of the Fifth or Fourteenth Amendments.

29. The sole ordinance that is the subject of the

Counter-Plaintiffs Counter-Complaint already has, as adopted by another Michigan township, already been challenged on a constitutional basis such as that now alleged by the Counter-Plaintiff, and the ordinance as adopted by the Counter-Defendant has, in a case that is controlling for the instant cause of action, been found by the Michigan Court of Appeals in Jott, Inc. vs. Clinton Township, 224 Mich App 513 (1997) to be constitutionally compliant.

30. The Counter- Defendant is entitled toan award of sanctions pursuant to MCR 2.114 and MCLA 600.2591.

31. The Counter- Defendant reserves the right, upon the completion of discovery or before, to file additional affirmative defenses as may be appropriate and necessary.

WHEREFORE , the Counter- Defendant respectfully requests that this Honorable Court enter a judgment of no cause of action in its favor, dismiss the Counter- Complaint with prejudice and award to the Counter- Defendant its costs and attorney fees so wrongfully incurred.

SOMMERS, SCHWARTZ,
SILVER & SCHWARTZ, P.C.

By:_____
David J. Szmanski (P40734)
Attorneys for Plaintiff
and Counter- Defendant
2000 Town Center, Suite 900
Southfield, MI 48075

(248) 355-0300

Date: October 5, 2001

BEST AVAILABLE COPY

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN, A Michigan Municipal Corporation,
Plaintiff and Counter-Defendant,

vs.

Case No. 00-036479CZ
Hon. Jeanne Stempien

THE GARTER BELT, INC., A Michigan Corporation d/b/a Legg's Lounge,
Defendant and Counter-Plaintiff.
_____/

Patrick B. McCauley (P17297)
David J. Szymanski (P40734)
Sommers, Schwartz, Silver & Schwartz, P.C.
Attorneys for Plaintiff and Counter-Defendant
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

Motion Hearing Date:
November 30, 2001

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(248) 356-1220

PLAINTIFF AND COUNTER-DEFENDANT'S

MOTION FOR SUMMARY DISPOSITION

NOW COMES Plaintiff and Counter-Defendant Charter Township of Van Buren, by and through its attorneys, Sommers, Schwartz, Silver & Schwartz, P.C., and, for its Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10), states as follows:

1. This action arises from the adoption by Plaintiff and Counter-Defendant charter Township of Van Buren ("Plaintiff Township") of an ordinance entitled "Nudity on Licensed Premises" that prohibits nudity as defined in the ordinance, including topless dancing, in establishments licensed by the Michigan Liquor Control Commission to sell alcoholic beverages.
2. In this action, the Plaintiff Township seeks only injunctive relief by way of an order compelling the Defendant and Counter-Plaintiff, the proprietor of a topless bar known as Legg's Lounge, to comply with the ordinance in question and enjoining the presentation of nudity and topless dancing while the Defendant and Counter Plaintiff ("Defendant Garter Belt") is licensed by the Michigan Liquor Control Commission.
3. By way of its Amended Answer to Complaint, Defendant Garter Belt maintains a counterclaim alleging, through five counts, that, in effect, the ordinance in question is unconstitutional and should, via the injunctive and declaratory relief requested, be found by this Court to be invalid and to have no effect.
4. For the reasons discussed in full in the accompanying brief, since there are no genuine issues of material fact in this case, and because the Defendant has failed to state a counterclaim upon which relief can be granted, the Plaintiff Township is, as a matter of law, entitled to the relief requested in its First Amended Complaint and is entitled to dismissal in full of the Defendant's counterclaim.

WHEREFORE, the Plaintiff and Counter Defendant respectfully requests that the Honorable Court grant its Motion for Summary Judgment and enter its order: a) permanently enjoining the Defendant from allowing female topless dancing in a state of nudity and described in the subject ordinance while serving alcoholic beverages to patrons; and b) dismissing with prejudice the Defendant's counterclaim.

Sommers, Schwartz,
Silver & Schwartz, P.C.

By:_____/s/_____
David J. Szymanski (P40734)
Attorneys for Plaintiff
And Counter Defendant
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Southfield, MI 48075
(248) 355-0300

Dated: October 31, 2001

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN, A Michigan Municipal Corporation,
Plaintiff and
Counter-Defendant,

vs.

Case No. 00-036479CZ
Hon. Jeanne Stempien

THE GARTER BELT, INC., A Michigan Corporation d/b/a Legg's Lounge,
Defendant and
Counter-Plaintiff.
/

Patrick B. McCauley (P17297)
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Motion Hearing Date:
November 30, 2001

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BRIEF IN SUPPORT OF PLAINTIFF AND

COUNTER DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

As mentioned in the foregoing Motion, this is an action in which the Plaintiff Township, by way of its First Amended Complaint, maintains a single claim/count - Request for injunctive relief. By that claim, the Plaintiff asks that the Court permanently enjoin Defendant from violating the Nudity on Licensed Premises ordinance that is the subject of this case. Through its counterclaim, the Defendant maintains five claims/counts -Violation of 42 USC 1983, preemption under state law and separate claims for injunctive relief, declaratory relief and attorney fees. The bottom line to those claims is that the Defendant is requesting the Court to enjoin enforcement of the same ordinance that is the subject of the Plaintiff's claim. With the recitation of facts and legal discussions that follow, it will be made abundantly clear that, as matter of law, the Plaintiff is entitled to the relief it requests and the Defendant's counterclaims should be dismissed with prejudice.

STATEMENT OF FACTS

Plaintiff Charter Township of Van Buren ("Plaintiff Township") is a municipal corporation located in Wayne County, Michigan that is organized and operated under the laws of the State of Michigan. Defendant The Garter Belt, Inc. ("Defendant Garter Belt") is a Michigan corporation that, since the late 1970s or early 1980s, has operated a topless bar in the Township under the name "Legg's Lounge." Since it has been in business, the Defendant has been licensed by the Michigan Liquor Control Commission (MLCC) to sell alcoholic beverages to patrons of Legg's Lounge on its premises.

Over the last several years, the Plaintiff Township has been in the process of a complete land use review that has

included revisions to the Township's master plan, zoning ordinances and zoning classifications. That review and revision process began on August 27, 1997 when the Township's Planning Commission authorized implementation of the process. As it relates to the subject matter of this case, the Plaintiff Township's land use review and revision process lasted until 1999, when the Township, effective March 11, 1999, adopted new land use regulations and zoning ordinances that included a package of new and revised ordinances addressing what are called sexually oriented businesses — "SOBs."

The Ordinance in Question

The package of SOB ordinances adopted by the Plaintiff's Board of Trustees and effective following publication on March 11, 1999, contains Ordinance Section 6-69 of the Charter Township of Van Buren Code of Ordinances. It is entitled "Nudity on Licensed Premises," and, in full substantive part, the ordinance (Exhibit A) states as follows:

> (1) No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.
>
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
>
> (a) the whole or part of the pubic region;

(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one-half of the area of the breast.

In the Defendant's bar, female dancers regularly expose for view their "breast area including nipple, or more than one half of the area of the breast," while patrons of the bar are sold, served and consume alcoholic beverages. On August 29, 2000, the Plaintiff Township, through its Director of Planning and Development, sent a letter to the owner of the Defendant and informed him that he/the Defendant was in violation of various ordinances of the Plaintiff Township regulating SOBs, including the Nudity on Licensed Premises ordinance. By the same letter, the Plaintiff Township requested that the Defendant stop violating the ordinance.

Meetings were had and letters exchanged between counsel for the Plaintiff and the Defendant in attempts to resolve this matter short of litigation. Those efforts were not fruitful, however. When the Defendant continued in its direct violation of the ordinance in question, the Plaintiff Township filed this action on November 6, 2000. At this juncture, it is of absolutely critical importance for purposes of the present motion that the Court note that the Plaintiff's Nudity on Licensed Premises ordinance is not unique and was not just written anew out of thin air when drafted for review and adoption by the Plaintiff Township. Quite the contrary.

In fact, an ordinance of almost identical language to that in question here was adopted by the Charter Township of Clinton, Michigan. The ordinance adopted by Clinton Township was challenged on the same constitutional and other grounds as the Defendant here challenges the Plaintiff Township's Nudity on Licensed Premises ordinance. The result was the Michigan Court of Appeals decision known as Jott, Inc. vs. Charter Township of Clinton, 224 Mich App 513 (1997). (Exhibit B.)

The Jott Decision - Word for Word

In the Jott case, the Michigan Court of Appeals was confronted with a situation identical - virtually indistinguishable, in fact - to that now before this Court. There, the Plaintiff had operated a bar in Clinton Township since 1984 and had done so pursuant to a covenant with the Michigan Liquor Control Commission that it would not offer "topless performers." In Clinton Township, the Plaintiff also operated its bar pursuant to two ordinances - one zoning and one general. The zoning ordinance regulated the location of topless bar, and the general ordinance - 291-A - prohibited nudity, including topless dancing, in establishments licensed by the Michigan Liquor Control Commission. Ordinance 291-A had been adopted by Clinton Township in 1992.

Clinton Township Ordinance 291-A stated in pertinent part as follows:

> Nudity shall be defined to be the exposure by view of persons, of any of the following body part, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
>
> (a) the whole or part of the pubic region;
>
> (b) the whole or part of the anus
>
> (c) the whole or part of the buttocks;
>
> (d) the whole or part of the genitals
>
> (e) the breast area including nipple, or more than one-half of the area of the breast;
>
> (f) the leg area of hips more than six (6) inches above

an area six (6) inches below the inseam, measured from the crotch;

(g) the stomach area below the navel or more than three (3) inches above an area three (3) inches below the breast.

That ordinance was attacked by the Jott plaintiffs, and they sought a declaration that the ordinance was unconstitutional. The matter eventually found its way to the Michigan Court of Appeals, which undertook a full-blown constitutional analysis and also considered the application of MLCC statutes that, themselves, addressed nudity and alcohol sales - MCLA 41.181 and MCLA 436.1916 (revised from MCLA 436.1 that was repealed). These statutes also are implicated in the instant case, with Defendant Garter Belt arguing and asserting as a defense that the same MLCC statutes preempt and render moot the Nudity on Licensed Premises ordinance of the Plaintiff. On that and other points central to the instant motion, the Jott Court reached several important conclusions:

a. Most important for present purposes, the Jott Court considered the scope of the definition of "nudity" in the Clinton Township ordinance - bringing in all of the attendant constitutional considerations, including those raised by the Defendant in the instant case - and, after a lengthy analysis, the Court found the Clinton Township ordinance to be constitutionally valid and enforceable after subparts f and g - those dealing

with the leg, hip and stomach areas only - were severed from it, and the Court found at p. 548 that, **"the remainder of the ordinance constitutionally valid and enforceable."**(emphasis added)

b. The Jott Court further determined at p. 541 that the grant of authority to the MLCC in MCLA 436.1916 to regulate nudity in MLCC licensed establishments, "Does not preclude local communities from controlling alcoholic beverage traffic within their boundaries in the proper exercise of their police power."

c. In addition, the Jott Court concluded at p. 545 that the definition of nudity contained in ordinance 291-A "is neither preempted by nor in conflict with MCLA 41.181(3)."

As discussed in more detail in the argument sections that follow, the excerpts from Jott just presented constitute the latest and controlling word of the Michigan Court of Appeals on the very same issues now before this Court. That is precisely the case because Ordinance Section 6-69 of the Charter Township of Van Buren Code of Ordinances - Nudity on Licensed Premises - was written after the Jott decision was published. That's why the Plaintiff's ordinance is word-for-word the same as the Clinton Township ordinance in Jott - with the exception, of course, of subparts f and g! Accordingly, the Michigan Court of Appeals already has declared the Plaintiff's Nudity on Licensed Premises ordinance to be constitutionally and otherwise valid and enforceable, and that is why this Court is asked to now enforce it, enter a permanent injunction and dismiss the Defendant's counterclaims.

ARGUMENTS

I. THE PLAINTIFF'S ORDINANCE IS NOT PREEMPTED BY ANY STATE MLCC OR OTHER STATUTES

By both its affirmative defenses asserted in response to the Plaintiff's First Amended Complaint and allegations in its counterclaim, the Defendant contends that the Nudity on Licensed Premises ordinance is "unconstitutional" because it conflicts "with MCL 41.181 and 436.1916(3)" and is "preempted by state law and are (is) therefore unenforceable." (Counterclaim - Exhibit C - at paragraph 24) The problem for the Defendant is the fact that its contention simply is not true. In fact, the only applicable preemption here comes in the form of the Jott decision effectively preempting the Defendant's arguments.

As alluded to in the preceding recitation of facts, the Jott decision specifically considered the MLCC statute preemption argument made by the Defendant here by way of affirmative defenses and counterclaim allegations and dismissed that argument. The Jott Court's analysis also was based on long-established law articulated in Michigan Supreme Court decisions.

In the Jott case, fore example, the plaintiffs there argued, just as the Defendant here argues, that "the definition of nudity contained in ordinance 291-A may not be sustained because it is preempted by the definition of 'public nudity' contained in the township ordinance act, MCL 41.181." Jott, supra at 543. The Jott Court considered that argument and dismissed it based on long-standing preemption rulings of the Michigan Supreme Court, including the ruling in the case of People vs. Llewellyn, 401 Mich 314, 322 (1977), which stated that:

> A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict

with the state statutory authority, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.

Based on that rule, the Jott Court concluded that Clinton Township, via Ordinance 291-A:

> is not attempting to regulate public nudity per se, but, rather, the circumstances under which liquor may be trafficked within its boundaries. Ordinance 291-A, by its terms, is applicable only to establishments holding liquor licenses; it has no applicability to public places where liquor is not sold. That preemption was not intended in this context is supported by the fact that the Legislature has conferred control over alcoholic beverage traffic in this state on the LCC, which, pursuant to authority granted it by MCL 436.7 has adopted Rule 436.1409(1) explicitly recognizing the authority of local government units to prohibit different types of nudity in establishments holding liquor licenses. Jott, supra at 544.545.

Even given all that, the Defendant here still persists in its preemption argument. The total lack of merit to that argument not only is confirmed by the Jott decision as just discussed, but, even more to the point, the vacuity of the preemption position is underscored by a look at the supposedly preemptive state statutes, themselves.

Upon review of Sec. (1) of MCLA 41.181 (Exhibit D), for example, the Court will see that it expressly states that:

> The township board of a township...may adopt ordinances regulating the public health, safety, and general welfare of persons and property, including, but not limited to ordinances concerning...the *regulation or prohibition of public nudity*, and may provide sanctions for the violation of the ordinances. (Emphasis added)

The same statute at MCLA 41.181(4) goes on to state that:

> As used in this section, "public nudity" means knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person including, but not limited to, payment or promise of payment of an admission fee, any individual's genitals or anus with less than a fully opaque covering, or a female individual's breast with less than a fully opaque covering of the nipple and areola.

Contrary to the Defendant's assertion that the Plaintiff Township's ordinance is preempted by MCLA 41.181, that very same ordinance specifically and expressly *authorizes* Van Buren Township to do exactly what it properly did.

As to the Defendant's affirmative defense and counterclaim allegation the MCLA 436.1916 serves to preempt the Plaintiff Township's Nudity on Licensed Premises ordinance, the situation is exactly the same. Again, look at the ordinance (Exhibit E) pertaining to the Michigan Liquor Control Commission and on-premises nudity, which states as follows in the most pertinent part at subsection (3):

> This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a

licensed premises located within that local unit of government.

Again, that ordinance does not preempt the Plaintiff's Nudity on Licensed Premises ordinance. Quite the contrary - MCLA 436.1916 specifically *authorizes* the exact type of ordinance that the Plaintiff Township has enacted that is the subject of this case.

As indicated above and just demonstrated here, there is nothing to the Defendant's "preemption" defense or counterclaim allegations. That is demonstrated most clearly, perhaps, by returning to the Jott decision, which specifically ruled as follows on the two key preemption points.

First, the Jott Court specifically ruled that the grant of authority to the MLCC in MCLA 436.1916 to regulate nudity in MLCC licensed establishments does not preclude local communities from controlling alcoholic beverage traffic within their boundaries in the proper exercise of their police power. On that particular point, the Jott Court went on to hold that "we find no conflict between ordinance 291-A and the regulations of LCC." Jott, supra at 543.

Second, the Jott Court stated as follows regarding the application of MCLA 41.181 as described above:

> We conclude that the definition of nudity contained in ordinance 291-A is neither preempted by nor in conflict with M.C.L. 41.181(3). Jott, supra at 545.

So much for the Defendant's preemption allegations and affirmative defenses. According to the Jott decision, which could not be more on point, the plain language of the controlling statutes, as well as a host of other applicable appellate cases, there is no merit to the Defendant's position, and the Plaintiff is entitled to summary disposition in its favor.

II. THE PLAINTIFF'S ORDINANCE IS NOT

CONSTITUTIONALLY INFIRM

In its affirmative defenses and counterclaim, the Defendant raises virtually every imaginable constitutional issue - from equal protection and prior restraint, to due process and even the right of assembly. In so doing, the Defendant contends that the ordinance in question comes up as infirm when judged against those purported constitutional considerations. It's a classic kitchen sink approach, with the Defendant throwing it all in and hoping that something will stick.

Despite that approach, there is a problem that totally overwhelms the Defendant's defenses and renders all of its so-called constitutional arguments moot for present purposes. For the Defendant, that fatal problem is - once again - the Michigan Court of Appeals decision in Jott.

In its case against Clinton Township, the Jott plaintiffs argued, precisely as Defendant Garter Belt argues here, that the ordinance in question there was constitutionally infirm on a facial and as-applied basis for a number of purported reasons, including the following:

- The ordinance was enacted without any evidence of a legitimate governmental purpose;

- The ordinance was not a content-neutral time, place and manner regulation of protected "speech" - topless dancing - designed to serve a substantial governmental interest; and

- The ordinance impermissibly infringes on expression protected by the First Amendment to the U.S. Constitution.

Based on those allegations, the trial court in Jott

analyzed the constitutionality of the ordinance using the four-part test enunciated in both Barnes vs. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991) and United States vs. O'Brien, 391 U.S. 387, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968). On appeal, however, the Michigan Court of Appeals determined that the trial court had applied the wrong analysis and that the proper standard to be applied was the "rational basis" analysis to be utilized in considering regulations enacted under the authority of the Twenty-First Amendment to the U.S. Constitution - the so-called "police power" amendment.

In undertaking its Twenty-First Amendment analysis, the Jott Court considered all of the leading cases, including California vs. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972); Doran vs. Salem Inn, INC. 422 U.S. 922, 95 S.Ct. 2561, 45 L. Ed. 2d 648 (1975); and New York State Liquor Authority vs. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed 2d 357 (1981) and found the Clinton Township ordinance to be constitutionally compliant according to Twenty-First Amendment considerations articulated in those cases. In the end, the Jott Court then turned to the Sixth Circuit Court of Appeals in Felix vs. Young, 536 F. 2d 1126 (C.A 6, 1976) and, quoting the Felix decision, ruled as follows:

> A state may promulgate broad prophylactic rules banning sexually explicit entertainment at licensed bars and cabarets so long as the regulations represent a reasonable exercise of a state's Twenty-first Amendment authority and are rationally related to the furtherance of legitimate state interests. However, if the state's authority to control liquor traffic is not implicated in a regulatory plan which impinges on free expression, the regulation must withstand stricter scrutiny. Jott supra at 540.

The Jott Court realized that, in relying on the Felix

decision and the others just noted, that it was addressing state authority through statutes under the Twenty-First Amendment in a context where a local body of government had enacted an ordinance. The Jott Court found no problem there. In relying on rulings addressing local bodies of government and their regulatory authority through ordinances under the Twenty-First Amendment in such cases as Johnson vs. Liquor Control Comm., 266 Mich 682 (1934) and especially Tally vs. Detroit, 54 Mich App 328 (1974) the Jott Court then stated as follows:

> Accordingly, we conclude that defendant (Clinton Township) has the authority under the Twenty-First Amendment to regulate the traffic of liquor "within its own bounds through the exercise of its police powers, subject to the authority of the Liquor Control Commission when a conflict arises." Jott, supra at 542.

From that conclusion, the Jott Court then undertook its MLCC preemption analysis discussed in the previous section of this brief. As pointed out there, the Jott Court then reached the overall and emphatic conclusion that the Clinton Township ordinance was not preempted by MLCC statutes MCLA 436.1916 and MCLA 41.181.

The Jott Court then completed its constitutional analysis of the Clinton Township ordinance by considering the actual language of the ordinance and its definition of "nudity" in light of the plaintiff's argument that the ordinance's definition is "irrational" and "not reasonably related to the objective of combating the undesirable social effects stemming from a combination of alcohol and the public exposure of those body parts" - specifically the pubic region, anus, buttocks, genitals and breast area. Bringing in all of the attendant constitutional considerations, the Jott Court expressed some concerns about only two of the definitional aspects of the ordinance as follows:

> However, like the trial court, we are troubled by the scope of the definition of nudity as outlined in subparts f and g of the ordinance's definition of nudity, which describe portions of the leg area or hips and stomach. Jott, supra at 546.

So, what did the Jott Court do? It found the Clinton Township ordinance to be constitutionally valid and enforceable after subparts f and g - those dealing with the leg, hip and stomach areas only - were severed from it. The Court then stated its overall conclusion as follows:

> Accordingly, we hold that subparts f and g of the definition of nudity contained in ordinance 291-A may be severed, thereby leaving the remainder of the ordinance constitutionally valid and enforceable. Jott, supra at 548.

Like the Clinton Township ordinance, the Nudity on Licensed Premises ordinance of the Plaintiff Township here contains a severability clause. More important is the fact that the Plaintiff Township's ordinance was written after the Jott decision was published and was written with that decision in hand. That's why the Plaintiff's ordinance is word-for-word the same as the Clinton Township ordinance in Jott - with the exception, of course, of subparts f and g! Those sections that the Jott Court found to be constitutionally problematic have never been a part of the Plaintiff Township's ordinance, and the Plaintiff's ordinance is word-for-word the same as that ratified as constitutionally compliant by the Jott Court. Since the Michigan Court of Appeals already has declared the Plaintiff's Nudity on Licensed Premises ordinance to be constitutionally valid and enforceable, this Court is asked to now enforce it by granting the instant Motion, issuing a permanent injunction and dismissing the Defendant's counterclaim.

III. THE DOCTRINE OF STARE DECISIS MANDATES GRANTING THE PLAINTIFF'S INSTANT MOTION AND DISMISSAL OF THE DEFENDANT'S COUNTERCLAIM

At this juncture, two important things should be absolutely clear. First, the Nudity on Licensed Premises ordinance put at issue here by both the Plaintiff's First Amended Complaint and the Defendant's Counterclaim is precisely the same as that found to be constitutionally compliant in the Jott case. Second, factually speaking, the situation of the topless bar in Jott is the same as that of Defendant's Legg's Lounge in this case - both establishments presenting topless entertainment were in existence prior to the enactment of the respective ordinances banning nudity on premises licensed by the MLCC. As a result, the doctrine of stare decisis requires this Court to grant the relief requested by the instant motion.

In Michigan, the doctrine or rule of stare decisis has been defined by the lead case of Topps-Toeller, Inc. vs. City of Lansing, 47 Mich App 720, 727 (1973) as follows:

> The rule requires courts to reach the same result when presented with the same or substantially similar issues in another case with different parties. The identity of the questions presented is determined by a review of the facts and issues. Unless the facts are essentially different, stare decisis will apply to provide the necessary uniformity, predictability and stability of the legal process.

Put another way in People vs. Bellanca, 43 Mich App 577, 580 (1972), the rule requires a lower court to follow the decisions of an upper court and to do so because:

> When a point has been settled by a decision, it forms a precedent which is not afterwards to be departed from.

The doctrine or rule of stare decisis is addressed on a somewhat more technical plane by the Michigan Rules of Court at MCR 7.215(C)(2), which states that:

> A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.

In this case, the Jott decision discussed at length earlier is a published opinion of the Michigan Court of Appeals and therefore has a "precedential effect" on the matters now before this Court. Further, the questions of law in Jott are precisely the same as those in the present case, and the facts of both cases are not "essentially different" - they are, in fact, virtually identical. For all of these reasons, this Court is bound by the rule of stare decisis to reach the same correct decision here that the Jott Court reached there - that is, to grant the Plaintiff's motion and enter its order providing the relief requested by the Plaintiff, including dismissal of the Defendant's counterclaim.

IV. THE INJUNCTION RELIEF SOUGHT BY THE PLAINTIFF IS ENTIRELY PROPER TO ABATE A NUISANCE PER SE

There is a final matter that merits some attention in the context of this motion, and it relates to the nature of the relief requested by both the Plaintiff's First Amended Complaint and the instant motion. That relief consists of a permanent injunction enjoining the Plaintiff from permitting nudity as defined in the subject ordinance and offering topless dancing in its establishment while licensed by the MLCC. That is basic injunctive relief, and the propriety of that relief is judged by standards articled in such cases as Fruehauf Trailer Corp vs.

Haglethron, 208 Mich App 447 (1995); DeBruyn Produce Co. vs. Romero 202 Mich App 92 (1993) and others with which the Court no doubt is very familiar. A key inquiry in the typical Fruehauf and DeBruyn test involves what best serves the public interest.

In this case, the Plaintiff has enacted its Nudity on Licensed Premises ordinance in service of the public interest. The Plaintiff Township did exactly what the Jott Court said it could and should do under its Twenty-First Amendment powers, and, even more on point, the Jott Court stated:

> The trial court did not question, nor do we, the existence of a legitimate governmental interest in prohibiting nudity in establishments holding liquor licenses. Jott, supra at 546.

That could not speak more clearly in favor of the public interest that is at the heart of the Plaintiff's enactment of the ordinance in question.

There is, however, something even more to the "public interest" consideration in this case, and that something more is the fact that the Defendant's continued offering of topless dancing in its MLCC licensed premise is a nuisance per se. MCLA 125.294, which is related to land use and zoning, states as follows regarding continued violations of ordinances - specifically township ordinances:

> A use of land, or a dwelling, building, or structure...in violation of local ordinance or regulation adopted pursuant to this act (Michigan's Township Zoning Act) is a *nuisance per se.* (emphasis added)

Again, it clearly is in the public interest to abate a nuisance, and that is exactly what MCLA 125.294 goes on to say a court ***shall*** do:

> The court ***shall*** order the nuisance abated and the owner or agent in charge of the dwelling...is liable for maintaining a nuisance per se.

The Court's authority to do what that statute says the Court ***shall*** do using an injunction such as the relief requested by the Plaintiff in this case long has been established. See Township of Farmington vs. Scott, 374 Mich 536, 540 (1965), which specifically states that a violation of a township ordinance "constitutes a nuisance abatable by injunction." Consistent with that authority and statutory obligation, the Court here is asked to grant the injunctive relief sought by the Plaintiff in order to serve the public's interest through the abatement of a nuisance per se by restraining the Defendant from violating the ordinance in question. In the end, that is exactly what the Jott Court did, and it is what this Court must do under the rule of stare decisis discussed earlier.

CONCLUSION

In the final analysis, what the Defendant really wants this Court to do through the affirmative defenses it asserts in response to the Plaintiff's First Amended Complaint and by way of its counterclaim allegations is to act in direct contravention of controlling appellate authority in the form of the Jott decision - a decision that could not possibly be more on point. The Court cannot and should not do that. Jott is the law that this Court must apply in conjunction with statutory mandates that require this Court to abate the nuisance per se that is the Defendant's continuing violation of the Plaintiff Township's Nudity on Licensed Premises ordinance. For those reasons and all the others provided herein, the Court is asked to enter its Order: a) permanently enjoining the Defendant from allowing nudity and female topless dancing in its Legg's Lounge premises while the same are licensed by the Michigan Liquor Control Commission; and b) dismissing with prejudice the Defendant's counterclaim.

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Dated: October 31, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
Plaintiff, **CASE NO. : OO-036479-CZ**
vs. **HON. JEANNE STEMPIEN**

THE GARTER BELT, INC., a Michigan corporation, d/b/a LEGG'S LOUNGE,
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

_____/

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DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

I. INTRODUCTION.

Van Buren Township Ordinance 2-16-99(2) ("Ord. 2-16-99(2)") provides as follows:

> (1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section. (emphasis added).

"Nudity" is then defined as follows:

> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
>
> (a) the whole or part of the pubic region;
>
> (b) the whole or part of the anus;
>
> (c) the whole or part of the buttocks;

(d) the whole or part of the genitals;

(e) the breast area including nipple, or more than one-half of the area of the breast. (emphasis added).

The power of a Township to adopt such an ordinance is derived from M.C.L. §41. 181 (MSA

5.45(1), which provides:

> Sec. 1 . (1) The township board of a township may, at a regular or special meeting by a majority of the members elect of the township board, adopt ordinances regulating the public health, safety, and general welfare of persons and property, including, but not limited to ordinances concerning . . . the regulation or prohibition of public nudity, and may provide sanctions for the violations of the ordinances . . .

"Public nudity" under M.C.L. §41 . 181(1) is defined as:

> Knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person, including but not limited to, payment or promise of payment of an admission fee, any individual's genitals or anus with less than a fully opaque covering, or a female breast with less than a fully opaque covering of the nipple or areola. . . . " (emphasis added).

The charging ordinance is unconstitutional because: A) It is unconstitutionally over broad and vague; B) it is preempted by Michigan statutory law; C) it exceeds the statutory grant of authority to enact regulations on public nudity; and D) it violates the Defendant's free expression and due process rights. For these reasons, Plaintiff is not entitled to summary judgment. In addition, summary judgment is not appropriate here because there are issues of material fact in regard to the underlying necessary constitutional predicate for the enactment of this ordinance, and any injunction would effectuate an impermissible prior restraint on expression.

II. SUMMARY JUDGMENT STANDARDS.

Plaintiff brings this motion for summary judgment pursuant to M. C.R. 2. 1 1 6(C)(8) and (10). A

motion under M.C.R. 2. 1 16(C)(8) "tests the legal sufficiency of the complaint. All well-pleaded factual

allegations are accepted as true and construed in a light most favorable to the **nonmovant**. " **Maiden v. Rozwood,** 461 Mich. 109, 597 N.W.2d 817, 823 (1999)(emphasis added). Nowhere in the entirety of the Plaintiff' 5 brief is there any analysis or even mention of this standard. In any event, attached hereto as Ex. A is Defendant's counter-complaint, which certainly sets for adequately and properly pled constitutional claims upon which relief can be granted.

A motion under M.C.R. 2. 1 16(C)(10) tests, however, the "factual sufficiency of the complaint."

> "In evaluating a motion for summary judgment brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by

> the parties, M.C.R. 2.116(G)(5), in the light most favorable to the party opposing the motion."

Id. A motion under subrule (C)(10) "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. " **Id.** at 823, citing, M. C .R. 2.116(G)(4)1 . Here, as will be established below, Plaintiff has failed to meet these various burdens.

III. CONSTITUTIONAL ADJUDICATION OF "ANTI-NUDITY" REGULATIONS.

In 1991 , the United States Supreme Court, in a highly fractured plurality opinion, concluded in Barnes v. Glen Theatre, Inc. , 501 U.S . 560, 1115 .Ct. 2456, 115 L.Ed.2d 504 (1991), that although nude performance dance entertainment received protections under the Constitution, under some limited circumstances a government could restrict those rights. The Court revisited this issue last year, and issued another plurality opinion in City of Erie v. Pap's, A.M., 120 S.Ct. 1382 (2000). Reiterating that nude performance dance entertainment received protections under the First Amendment, five Justices of the Court (a majority) concluded (Pap's, 120 at 1391, 1402) that a general "across-the-board" anti-nudity provision was to be evaluated as a content-neutral regulation2 pursuant to the four part test of **United States v.**

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1. The Plaintiff totally fails to comply with this rule. For this reason alone, Plaintiff's motion must be denied.

O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which analyzes:

1. Whether the regulation at issue is within the govermnent's constitutional power;

2. **Whether the regulation furthers an important or substantial governmental interest;**

3. Whether the governmental interest is unrelated to the suppression of free expression; and

4. Whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

In **Pap's**, a majority of the Court also concluded that the sole justification for enacting such a prohibition would be in regard to the "secondary effects" of certain forms of adult entertainment establishments. See, e. g. **, Pap's,** 120 S .Ct. at 1393-94, 1402. In considering the predicate of such "secondary effects" (such as increase of crime, decrease in property values, increase in urban blight) as a justification for

enacting a regulation:

> "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Accordingly, to pass constitutional muster under the "secondary effects" doctrine, a city must: 1) Have a problem; and 2) be in possession of evidence of the problem that it 3) **relies upon** and 4) that is **reasonably believed to be relevant** to the problem to be addressed.

For the reasons as set forth in the section immediately below, it is clear that Van Buren Township cannot satisfy any of these constitutional standards, or at the very least, that there are material issues of fact in regard to whether they can meet such burdens. Before discussing these issues , however,

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2. Defendant contends here that rather than an "across-the-board" prohibition, the regulation at issue is a content-specific prohibition which is subject to strict constitutional scrutiny. Regardless, Defendant will analyze Ord. 2-16-99(2) under intermediate scrutiny in this brief, and for the same reasons, this regulation would fail under strict scrutiny as well.

two factors must be borne in mind.

First, because of the recognized preferred position of First Amendment rights, there is no general presumption of constitutionality that would normally attach to other legislative enactments. See, e.g., **Durham v. Brock**, 498 F. Supp. 213, 221 (M.D. Tenn. 1980), **aff'd**, 698 F.2d 1218 (6th Cir. 1982), and cases cited therein. Second, it is the government' s general burden to substantiate the constitutionality of the deprivation of protected rights, whether it be by way of a direct imposition or, in the context of **O'Brien**, only by an "incidental" infringement. See, e.g. , **Perry Education Ass'n. v. Perry Local Educator's Ass'n.** , 460 U.S . 37, 45 , 103 5 . Ct. 948 , 74 L.Ed.2d 794 (1983) (strict scrutiny); and **Widmar v. Vincent**, 454 U.S. 263, 270, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (intermediate scrutiny).

And, it is the additional **specific** burden of the Township to establish that the challenged regulation advances the governmental interest "**in a direct and effective way**. . . . " **Ward v. Rock Against Racism**, 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (emphasis added). This burden is not satisfied by "mere speculation or conjecture, " and the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. " **Edenfield v. Fane**, 507 U. S . 76 1 , 1 13 S . Ct. 1792 , 123 L.Ed.2d 543 , 555 (1993) (emphasis added). If this connection is not proven, the law cannot stand. See, e.g., **East Brooks Books, Inc. v. City of**

Memphis, 48 F.3d 220, 226 (6th Cir. 1995) ("We now turn to the provisions challenged by plaintiffs to determine whether each provision furthers the government interest in minimizing secondary effects without posing more than an incidental burden on First Amendment rights"). See also, **Jott, Inc. v. Township of Clinton**, 224 Mich.App. 513, 569 N.W.2d 841 , 855, (1997) (various portions of an "anti-nudity" ordinance stricken as the court found no "evidence in the record" to support a conclusion that public exposure of certain body parts created undesirable secondary effects).

IV. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT IN ITS FAVOR.

A. VAN BUREN TOWNSHIP HAS NOT AND CANNOT MEET THE RENTON STANDARD.

There is **absolutely nothing** in the record submitted by the Township here which substantiates that it meets this **Renton** evidentiary burden. Cf., **Jott**, 569 N.W.2d at 848 (testimony in the case revealed that township officials had considered various studies of the impact of adult entertainment businesses, and that the "trial court properly ruled that Defendant could rely upon studies produced by other cities. . .")(emphasis added).

Joannie Payne, the township clerk and member of the

board of trustees, testified at deposition that she was aware of no complaints generated because of the Defendant's business, that she did not know of anyone who lives in the Township who had been negatively affected by the Defendant' s business, and that she was aware of no complaints regarding any decrease in property values or increase in crime in the area surrounding the Defendant' s business . See, Ex. B , Deposition of Joarinie Payne, pp . 20-22.

Similarly, Cindy King, the Township Supervisor, testified at deposition that neither the board of trustees nor anybody else did any studies on the effects of adult entertainment in the township, that she did not review any outside studies that had been done by other communities in connection with the adoption of these ordinances, and that nobody testified or provided any information to the board relevant to these issues. See, Ex. C, Deposition of Cindy King, p. 22. Ms. King also testified that nobody provided any information to her, nor was there any discussion, as to how requiring dancers to cover more body parts would result in a reduction of any alleged secondary effects. **Id**. at p. 33.

Three recent decisions recognize the impropriety of permitting the government to justify a regulation on expression with such a dearth of substantiation, particularly when a business had been in existence for such a long period of time and had caused no perceived problems. And, Plaintiff acknowledges that Legg' s Lounge has been operating as a topless bar since the late 1970's or early 1980's. Plaintiff's Brief, p. 2.

In **XLP Corp. v. County of Lake**, 743 N.E.2d 162 (Ill. App. 2000), the government sought summary disposition in regard to a constitutional challenge to an adult business regulatory ordinance. The trial court granted summary judgment on the pleadings, and the appellate court reversed, noting that:

> "None of the cases cited by the Defendant in support of its position that a governmental body can rely on outside studies, judicial decisions, and the experiences of other governments in other jurisdictions in adopting its legislation were decided on a motion for judgement on the pleadings as occurred here. Nor has our research revealed any cases of this nature. In every case relied upon by Defendant, **the affected party had an opportunity to go to trial or to test the assertions of governmental interests in an evidentiary proceeding**. This was true even in **[Pap's v. City of] Erie** where, as pointed out in the Supreme Court' s opinion, the affected party had ample opportunity to contest the city council' s findings about secondary effects, including in-state proceedings, although it never chose to do so. **[Pap's v. City of]Erie**, 529 U.S. at 298."

XLP, at 167-168 (emphasis and clarification added).

The county in **XLP** also attempted to rely on **Renton** for the proposition that "a legislative body does not have to wait until a problem occurs before enacting an adult use ordinance. " 743 N.E.2d at 170. But the court noted that there was a crucial difference, because "in **Renton** there were no adult businesses in existence at the time the city enacted its ordinance. . . . Here, however, where plaintiff's had been in business for fifteen years at the time defendant enacted its ordinance, plaintiff' s allegations that defendant wrongly relied on outside studies instead of considering plaintiff' s existing businesses to determine whether such businesses cause adverse secondary effects presented in an **issue of fact**. " at 170 (clarification and emphasis added). Because a factual dispute existed on this issue, the court determined that the case must be sent back for further proceedings.

In a case that is almost factually indistinguishable from the case at bar, the Eleventh Circuit considered the constitutionality of an ordinance prohibiting various forms of nude and partially nude dancing in liquor establishments in **Flanigan's Enterprises, Inc. v. Fulton County,** 242 F.3d 976 (11th Cir. 2001). The federal appellate court then noted that in evaluating whether the govermnent has met its burden under O'Brien, the Defendants must have `some factual basis for the claim that [adult] entertainment in an establishments serving alcoholic beverages results in increased criminal activity' and other undesirable community conditions. " **Id.** at 985 (internal cites omitted). The court determined that" the evidence in the record relating to the conditions in Fulton County shows unequivocally that property values in

neighborhoods adjoining the Clubs have increased during the time the Clubs have been in existence and the surrounding buildings show no sign of blight, or lack of physical maintenance. Moreover, the Fulton County police study found greater reported crime connected with establishments that served alcohol but did not feature adult entertainment. " **Id.** at 986. The Court basically determined that where local "evidence" on secondary effects was found to be lacking, the local governmental body could not simply ignore it.3 The Court concluded by stating that "the case might be different were the clubs a recent addition to Fulton county neighborhoods. It is undisputed, however, that Plaintiffs continually operated these adult entertainment establishments for nearly a decade. " **Id.** at 986. The same circumstances exist here.

Similarly, in **Erie Boulevard Triangle Corp. v. City of Schenectady,** 152 F.Supp.2d 241 (N.D. N.Y . 2001), a United States District Court evaluated the constitutionality of an amendment to a zoning ordinance dealing with "adult" businesses. In ruling the amendment unconstitutional under the **Renton** standard, the Court concluded that, as is the case here, "the city has submitted no evidence whatsoever that either the 1999 amendment or the 2000 amendment was designed to address secondary effects of adult businesses within the city which were not adequately addressed by the initial version of the adult ordinance, or that plaintiffs' businesses are responsible for any adverse secondary effects in their current, grandfathered locations. " **Id.** at 247.

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3 Cf , Testimony of Payne and King referred to above.

Finally, in regard to the **Renton** "reasonable reliance" component, the Defendant submits here the Affidavit of Dr. Daniel Linz, (attached as Ex. D) who has conducted a great deal of "secondary effects" research and who is one of the co-authors of a peer-reviewed article on this issue (attached to his Affidavit enclosed) recently published in the journal of Communication Law and Policy. Dr. Linz points out that he has reviewed the ordinance at issue in this case, excerpts of the testimony of Ms. Payne and Ms. King, reviewed other testimony and evidence, and finds no basis for the regulation at issue. In fact, Dr. Linz further opines that based upon his own review of the "secondary effects" research, there is, as the Eleventh Circuit recently found in the **Flanigan's Enterprises** case, no connection between providing "topless" dancing at a liquor facility and " secondary effects. " Ex. D , ¶ s 9- 11 . Accordingly, at least for summary judgment purposes, there is at least a genuine issue of material fact in regard to the predicate for enacting this ordinance.

B. THE MICHIGAN COURT OF APPEALS DECISION IN JOTT HAS BEEN LIMITED BY THE U.S. SUPREME COURT DECISIONS IN 44 LIQUORMART AND PAP'S.

Having pointed out this initial failing of Ord. 2-16-99(2), but before getting to the other constitutional infirmities of that regulation, Defendant must first address the centerpiece of the Plaintiff's motion; that being the Court of Appeals decision in **Jott.** After discussing that decision and

this case, the Plaintiff simply states that **Jott** is the law that this Court must apply. " Plaintiff's Motion, p. 17.

But whatever the merits or applicability of the **Jott** decision, the Plaintiff either ignores or is simply ignorant of the fact that **Jott** has been abrogated by the U. S. Supreme Court decisions in **44 Liquormart v. Road Island**, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and **Pap's**.4

In **44 Liquormart**, a unanimous Supreme Court stated that where speech protected by the First Amendment is abridged, " it is not shielded from constitutional scrutiny by the Twenty First Amendment." 517 U.S. at 489. **And, the Supreme Court clearly stated that "we now hold that the Twenty First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment. "** **Id.**, at 517 (emphasis added).

Every court that has considered 44 Liquormart since the time of its decision-- possibly with the exception of **Jott** -- has reached the conclusion that the Defendant offers here. In **Junction 615 v. Ohio Liquor Control Commission**, 732 N.E.2d 1025 (Ohio Ct. App. 1999), the Ohio Court of Appeals noted that the U. S . Supreme Court had held that

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4 It is true that **Jott**, in a footnote, refers to **the 44 Liquormart** decision. See, **Jott**, n.6. At the time of **44 Liquormart** , however, **Barnes** was the "law of the land" in regard to the constitutional adjudication of anti-

"the Twenty First Amendment could not be used to qualify protections afforded by other constitutional provisions, and overturned the reasoning used in the [**California v. lLaRue**[,409 U. S . 109 , 93 S . Ct. 390, 34 L.Ed.2d 342 (1972)] decision. " 732 N.E.2d at1031. The Ohio Court of Appeals reasoned that it then must disregard a Ohio Supreme Court decision that had relied strongly on the reasoning in **LaRue** (just as the **Jott** Court did in Michigan) because it was not analyzed under "current First Amendment standards. " **Id.** The **exact same circumstance is at hand here**, in that the "current First Amendment standards" are no longer LaRue, but the Supreme Court decision in **Pap's.**

It is equally important to note that the court in **Jott** applied only the lowest level of scrutiny – rational basis -- in regard to the ordinance that it was examining . 569 N.W .2d at 85 1 . **44 Liquormart** makes it clear, however, that "the Supreme Court also reaffirmed that the O'Brien intermediate level of review applied to the prohibition of nudity in liquor license establishments. . . . " **Purple Orchid Inc. v. Pennsylvania State Police,** 721 A.2d 84 (Pa. Commn. Ct. 1998) (emphasis added). That intermediate

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nudity provisions. Now, and subsequent to **44 Liquormart**, **Pap's** is the standard and specifically deals, as is discussed herein, with the circumstance of exotic dancing in the context of a liquor facility. Accordingly, the statements in **Jott** (569 N.W.2d at 852) indicating that the Twenty-first Amendment may still "outweigh any First Amendment interest in nude dancing, " are no longer the law of the land in light of **Pap's**.

scrutiny is clearly the appropriate standard **now** in regard to **this ordinance** is further confirmed by **Pap's,** which also applied the **O'Brien** level of **intermediate scrutiny** to a nudity prohibition that affected liquor clubs. Accordingly, **Jott** does not even analyze the ordinance at issue there under the level of constitutional scrutiny which this Court must now apply in light of the decision in **Pap's**. **Jott** therefore has absolutely no application to the questions at hand.5

C. THE CHALLENGED ORDINANCE IS FACIALLY OVERBROAD.

The prohibition against nudity in Ord. 2-16-99(2) applies to all establishments licensed by the Michigan Liquor Control Commission. And, the ordinance does not merely ban "true" nudity, but would also prohibit such attire as a dress that, although covering the nipple, has a plunging neckline which exposes any portion of the "breast area, " or a bikini bathing suit bottom that does not fully cover the "whole" area of the buttocks (ie. , a "thong"). The examples of what can be prohibited under this ordinance, far beyond the area of "adult" entertainment, are almost limitless, but a few selected examples make the constitutional point. Conduct that would be prohibited includes nude and semi-nude "legitimate" theatrical performances (e.g. , Hair, Equus, Oh! Calcutta, Salome, and Dance of the Seven Veils) in facilities that are permitted to serve alcoholic beverages (which most are) ; and just about any opera or chorus line where there can be exposure of the specified body parts "either directly or

indirectly, including but not limited to exposure, see-through clothing articles or body stockings . . . . " See, Ord. 2-16-99(2) (defining "Nudity"). Most importantly, also prohibited would be any theatrical production, dance review, ballet or opera (in an establishment licensed to serve alcoholic beverages) where there is a bare chested **male** performer, in that **the definition of "nudity " does not distinguish between the male and female breasts**. These are examples of the forms of **expressive** nudity banned by the charging ordinance.

There are also a myriad of examples of non-expressive nudity that would similarly be prohibited. If a health club has a liquor license (and those that have adjoining restaurants usually do), nudity in the locker room, shower room, or evenbathroom is prohibited (an individual will either"frequent" or "loiter" in these areas -- whatever those terms may mean). **In fact, the exposure ofthe defined bodyparts in any bathroom in any bar in Van Buren Township is criminalized.** There are, simply, **no exceptions** to the scope of this ordinance. Another example would be hotels , most of which have liquor licenses. Any form of nudity in the entire facility would be banned, including in one's own hotel room. One would hope, of course, that most

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5 As will be discussed more fully, infra, **Pap's** also limits the amount of clothing that a government can mandate, and the challenged ordinance is certainly violative of such limitations. Again, **Jott** does not analyze these issues under the current constitutional standards.

police and prosecutors would not go after health club patrons, theatrical performers, bathroom users, and "PG" rated chorus line dancers, but the legally salient point is that **there is nothing in the ordinance that prohibits them from doing**.6 Because this ordinance prohibits a great deal of constitutionally protected expression that has nothing to do with the supposed " secondary effects" of combining alcohol and public nudity, and also bans other forms of non-criminal nudity, the charging ordinance is unquestionably unconstitutionally and impermissibly overbroad.

The Sixth Circuit U.S . Court of Appeals has recognized that "the overbreadth doctrine constitutes an exception to traditional rules of standing , and is applicable in First Amendment cases in order to ensure that an overbroad law does not act to `chill' the exercise ofrights guaranteed protection. **" Triplett Griller. Inc. v. City of Akron**, 40 F.3d 129, 135 (6th Cir. 1994) (citations omitted). In Triplett, the City of Akron passed a public nudity ordinance which prohibited a person from knowingly or intentionally, in a public place, appearing in a state of nudity. "Nudity" under that ordinance was defined almost identically to how that term is defined under Ord. 2-16-99(2).

In a ruling that has **direct application** to the constitutional challenge at issue here, the Sixth Circuit

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6 See, **Forsyth County v. Nationalist Movement**, 505 U.S . 123, 133 n. 10. 112 S. Ct. 2395 , 120 L.Ed.2d 101 (1992).

found the Akron ordinance facially overbroad, by stating:

> "The Akron public decency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only expressive activities associated with harmful secondary effects, and includes no limiting provisions. Instead Akron's wide ban on public nudity sweeps within it's advent, expressive conduct not generally associated with prostitution, sexual assault, or other crimes. As Justice Souter acknowledged in **Barnes Fv. Glen Theatre, Inc**. , 50 1 U. S . at 583 n.2] : "It is difficult to see, for example, how the enforcement of Indiana statute against nudity in a production of "Hair" or "Equus" somewhere other than adult theatre, " would further the state's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of **Renton**-type adult entertainment was correlated with such secondary effects."

Triplett, 40 F.3d at 136 (clarification added).

The same circumstances are at issue here. In any type of theater or opera house where these forms of "legitimate" theatrical performances are presented, and where the

establishment is licensed to sell alcoholic beverages, this constitutionally protected form ofexpression is prohibited. For the same reasons that the law in **Triplett** was found to be overbroad, Ord. 2-16-99(2) is similarly constitutionally infirm.

Nor is there any difference in the **Triplett** analysis when the issue of liquor is present. In a very recent case that is almost identical to the circumstances at issue here, a federal district court just across Lake Erie found such an "alcohol" regulation to be similarly unconstitutional for the same reasons as noted in **Triplett. In J.L. Spoons, Inc. v. O'Connor**, 194 F.R.D. 589 (N.D. Ohio 2000), Judge Ann Aldrich, in reaffirming her earlier entry of a preliminary injunction against a "nudity" ban in alcohol establishments as being facially overbroad (issued prior to **Pap's**), stated that "the Supreme Court' s recent decision in **City of Erie [v. Pap's1** simply does not shed any meaningful light on the overbreadth or vagueness analysis that underpinned this Court' s decision to grant the Plaintiff' s Preliminary Injunction." **J.L. Spoons**, 194 F.R.D. at 592 (clarification added).

In that court's prior ruling, Judge Aldrich invalidated, as overbroad, an Ohio **statute** (as opposed to the **municipal** ordinance here) prohibiting nudity in a liquor license establishment.7 In analyzing the Sixth Circuit decision in **Triplett,** she concluded that:

"The prohibition on appearing in a state of

> nudity contained in sections (a)(3) and (b)(2) is unconstitutionally overbroad for similar reasons. A variety of artistic performances, including the off-cited "Hair" and "Equis" as well as smaller productions like Karen Finley's One Woman Show's, are constitutionally protected and involve nudity. Yet rule 52 makes no exception for such artistic performances. When a regulation sweeps in performances that fall outside rubric of adult entertainment, the regulation is vulnerable to an overbreadth attack. In fact, the only difference between Rule 52 ` s ban on nudity and the ordinance declared to be overbroad in **Triplett Grille, is that Rule 52 is limited to venues with liquor licenses. While Rule 52 does not amount to a total ban on public nudity, a ban does not need to be total to be substantially overbroad.** The relevant question is whether the regulation 'reaches a substantial amount of constitutionally protected conduct', such that the regulation threatens to chill the exercise of protected activity."

J.L. Spoons, Inc. v. O'Connor, 190 F.R.D. 433, 442 (N.D. Ohio 1999) (emphasis added, citations omitted).

The decisions in **J.L. Spoons** are therefore virtually identical to the circumstances at issue here, and any assertion

by the Plaintiff that any overbreadth analysis is somehow governed by **Jott** is misplaced for the reason that the Supreme Court made very clear in **Pap's** that nudity regulations could be constitutional only in relation to establishments that engendered " secondary effects . " Plaintiff has not made, and cannot make, any such showing to justify the breadth of this ordinance, and it is therefore facially unconstitutional.

D. ANY INJUNCTION WOULD EFFECTUATE AN IMPERMISSIBLE AND UNCONSTITUTIONAL PRIOR RESTRAINT ON EXPRESSION.

Van Buren Township does not merely want to be able to criminalize certain (what it considers to be illegal) expression after it occurs, but it wants an injunction to prohibit expression even before it is presented. Such an injunction would without doubt effectuate a prior restraint, which is impermissible

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7 Rule 52 of the Ohio Liquor Code prohibited nudity which was defined as "a showing (including electronically showing" of the human male or female genitals, pubic area or buttocks (or anus) with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola, or the showing of the covered male genitals in a discernibly turgid state. **J.L. Spoons, Inc.v. O'Connor,** 190 F.R.D. 433, 436 (N.D. Ohio 1999).

under established Supreme Court precedent.

"**Any** system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. " **Bantom Books, Inc. v. Sullivan**, 372 U.S. 58, 70, 83 S.Ct. 631 , 9 L.Ed.2d 584 (1963) (emphasis added) . The prior restraint doctrine was established in the seminal case of **Near v. Minnesota**, 283 U. S . 697, 5 1 S . Ct. 625 , 75 L.Ed. 1 357 (193 1), but the case which is truly on "all fours" with the circumstances at issue here is that of **Vance v. Universal Amusement Co., Inc**., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). At issue there was a Texas public nuisance statute authorizing injunctions against the use of premises for the exhibition of what was considered to be obscene material. The Supreme Court held such a law unconstitutional.

> " The Court of Appeals was quite correct in concluding both (a) that the regulation of communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance and (b) that the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication."

Id. at 315-16 (emphasis added).

Given the fact that there were no "special safeguards"8 governing the entry and review of such restraining orders, that law was unconstitutional. Similarly, here, the imposition of an " across-the-board" prohibition effectuates an impermissible prior restraint. Plaintiff could present at its establishment entertainment that receives full constitutional protections and could not be precluded under this ordinance, regardless of the modicum of attire. Accordingly, the requested relief from this Court is overbroad and constitutionally impermissible.

E. Ord. 2-16-99(2) EXCEEDS THE GRANT OF AUTHORITY GIVEN TO THE TOWNSHIP BY M.C.L. §41.181.

As noted above, M.C. L. §41.181(1) provides that a Township may adopt ordinances regulating prohibited public nudity. As defined in M.C. L. § 41. 181(4), public nudity means "knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person including, but not limited to, payment of, or promise of payment of an admission fee, **any individual's genital or anus with less than a fully opaque covering, or female individual's breast with less than a fully opaque covering of the nipple or areola." This is a pasties and g-string statutory limitation fully consistent with Pap's!**

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8 See, **Freedman v. Maryland**, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and **Nightclubs, Inc. v. City of Paducah,** 202 F.3d 884 (6th Cir. 2000).

Contrary to the enabling statute's authority, however, Ord. 2-16-99(2) exceeds that limited grant by prohibiting exposure in a liquor licensed establishment of such additional areas as the buttocks, the male breast, the female breast area beyond the nipple, and various forms ofpartial dress. As a result, the Township ordinance conflicts with state statutory law and is therefore unenforceable.

The applicability of M.C.L. §41 . 181 to a Township' s attempt to regulate public nudity has been previously addressed in **Nadeau v. Township of Clinton,** 827 F.Supp. 435 (E.D. Mi. 1992). In **Nadeau,** Clinton Township adopted an ordinance prohibiting topless dancing.9 In determining that the statute was unenforceable, the court stated:

> "The definition of public nudity contained in Michigan Compiled Laws Annotated §41.181(3) preempts the definition contained in number 291-A. A municipality may not enact an ordinance that is in direct conflict with the state's general statutory scheme and when it does, the ordinance is invalid. **Sherman Bowling Center v. City of Roosevelt Park**, 154 Mich. App576 397 N.W. 2d 839 (1986). **A direct conflict does exist here . The ordinance prohibits what the**

9 Prior to amendment, M.C.L. §41. 181 only defined public nudity as an exhibition of an individual's genital or anus with less than a fully opaque covering.

state statute permits. Because 291-A conflicts with state law, it cannot be enforced."

Nadeau, 827 F.Supp. at 437 (emphasis added).

Like the ordinance at issue in **Nadeau**, Van Buren Township's ordinance conflicts with the state statutory scheme regulating public nudity, and is therefore unenforceable. Plaintiff has argued that this argument is foreclosed because of **Jott** See, e.g. , 569 N.W.2d at 853-55 . However, **Jott** was decided after **Barnes** but prior to **Pap's**. **Pap's** is binding in regard to the constitutional analysis at issue here, and for the reasons that will be set forth in the section immediately below, Van Buren Township cannot go beyond constitutional standards of prohibiting nudity, regardless of the issue of liquor.

F. THE NUDITY PROHIBITIONS ARE BROADER AND MORE RESTRICTIVE THAN ALLOWED BY THE SUPREME COURT.

In **Barnes,** the plurality opinion authored by Chief Justice Rehnquist indicated that "Indiana's requirement that the dancer wear at least pasties and g-strings is modest, and the bare minimum necessary to achieve the state's purpose. " **Barnes,** 501 U.S. at 571-72. The Court reexamined and clarified this issue in **Pap's** when the four-Justice plurality (and on this issue concurred in by Justice Souter, giving a

five member majority) stated that "it also may be true **that a pasties and g-string requirement** would not be as effective as, for example, a requirement that the dancers be **fully clothed, but the city must balance its efforts to address theproblem with the requirement that the restriction be no greater than necessary to further the city's interest.** " **Pap's,** 120 S .Ct. at 1397 (emphasis added). The Court concluded that "the fourth and final **O'Brien** factor -- that the restriction be **no greater** than is **essential** to the furtherance of the government interest -- is satisfied as well. " **Id**, at 1397 (emphasis added). This is because "any incidental impact on the expressive element of nude dancing is de minimis. The requirement that dancers wear **pasties and g-strings** is a **minimal** restriction in furtherance of the asserted government interest, and the restriction leaves ample capacity to convey the dancer's erotic message. "Id. (emphasis added). Regardless of whether or not alcoholic beverages are involved, requiring additional clothing beyond pasties and g-strings certainly restricts the ability to "convey the dancer' s erotic message, " is therefore impermissibly overbroad, and is not narrowly tailored pursuant to the fourth prong of **O' Brien** 10.

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10 Between the decisions of **Barnes** and **Pap's**, various courts were confronted with the question of whether the "pasties and g-string" statement in **Barnes** set a limit. The Michigan Court of Appeals in **Jott** apparently concluded that it did not. However, numerous other courts came to the opposite conclusion. See, e.g., **MD II Entertainment, Inc. v. City ofDallas,** 935 F.Supp. 1394, 1398-99 (N.D. Tex.

Foot note 10 continued

1995), the district court dealt with a nudity requirement similar but less restrictive than the one at issue here, and determined that "in the instant action, however, the city has gone far beyond a restriction aimed at nudity and a requirement that the dancers wear pasties and g-strings. To maintain their current business locations, Plaintiffs would have to dress the dancers in bikini tops (such as is the case here). The new amendments are directed at the essential expressive nature of Plaintiffs' businesses and are content based restrictions." The court also noted that "no evidence indicates that a requirement that dancers wear bikini tops instead ofpasties will reduce deleterious secondary effects." **Id** at 1398.

A similar conclusion was reached in **Steverson v. City of Vicksburg**, 900 F.Supp. 1, 11 (S.D. Miss. 1994) ("the ordinance before the court today is more restrictive in as much as the dancers/entertainers must wear the equivalent of a bikini top and bottom, whereas the dancers in Barnes were only required to wear pasties and g- strings"). The court determined that "the city has not met its burden in showing how a lesser degree of nudity furthers its stated interest in curtailing harmful secondary effects. Accordingly, the city's requirement that the dancers/entertainers wear more clothing than pasties and g-sirings is not narrowly tailored to support its asserted interest in protecting and preserving the quality ofthe city's neighborhoods. . . ." **Id** at 13.

Finally, the court in **Nakatomi Investments, Inc. v. City ofSchenectady,** 949 F.Supp. 988 (N.D. NY 1997) echoed these conclusions by stating:

"Each additional piece ofrequired clothing must result in a further reduction in pernicious side effects. Without demanding this connection at each step, each additional layer ofrestriction can be legally added simply on the basis that the previous restriction was valid, until the entire activity is banned: i.e., nude dancing is permitted so long as the dancers wear pasties and g-strings; then bathing suits; then t-shirts; then long pants and a sweater. . . . In recognition of the danger of creeping encroachment, the First Amendment requires, not that the restrictions merely be related to the governmental interest asserted, but rather that each restriction imposed furthers an important or substantial governmental interest."

Id. at 997. The Supreme Court's subsequent decision in Pap's substantiates the correctness of these three decisions, and the improper construction in **Jott**

_____End of footnote 10_____.

Here, it is clear that the charging ordinance goes well beyond the "de minimus" clothing limitation as set forth in **Pap's.** A "g-string" could not even be worn, since it shows the entire buttocks. Similarly, "pasties" could not be worn in Van Buren Township since the "breast area" would not be covered. Regardless of the question of whether a municipality could require additional clothing based upon an appropriate evidentiary record (which is certainly not an issue here), the Van Buren Township regulation prohibits more forms of expressive entertainment than can be prohibited under the First Amendment pursuant to the decisions of the United States Supreme Court.

G. THE TOWNSHIP IS NOT EMPOWERED BY THE MICHIGAN LIQUOR CONTROL ACT TO ENACT THE ORDINANCE AT ISSUE.

Van Buren Township has apparently enacted this ordinance pursuant to the provisions of R.436. 1409(1) of the regulations promulgated under the Michigan Liquor Control Code, which precludes an on-premise licensee from allowing on the licensed premises "a person who exposes to public view the pubic region, anus, or genitals or who displays other types of **nudity prohibited by** statute or **local ordinance.** " (emphasis added) . This regulation has been in existence for years, but a recodification of the Liquor Control Code in October of 1998 limits the expansive nature of this regulation.

The recodification of the Liquor Control Code added

a new section "3 to M.C.L. §436. 1916, which is generally known as the "Rogers" bill (named for then State Senator Mike Rogers -- now a U.S.Congressman). The amended provision states:

"An on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for and has been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. **This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95, 000 or less.** " (emphasis added).

This Court can certainly take judicial notice of the fact that Wayne County, with approximately 2,000,000 residents, has a population greatly in excess of 95,0000 people, and, therefore, M.C.L.§436 . 19 1 6(3) does **not** apply in Wayne County or to the Defendant' s establishment. And, it is, of course, axiomatic that **statutes** control over **regulations**. Accordingly, the provision contained in subsection 3 of M.C.L. §436.1916 that would permit greater restriction of nudity than as is found in the state liquor code regulations ("This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government") does **not** apply to Wayne County. Therefore, by way of the Rogers Bill, the Liquor Control

Code divests counties of 95 ,000 or greater from enacting regulations to prohibit forms of nudity that are broader than precluded under the code itself. For this reason, Van Buren Township simply does not have the authority to enact the charging ordinance, and the requested injunction should be denied for this basic reason.

H. THE ORDINANCE AT ISSUE VIOLATES DEFENDANT'S DUE PROCESS RIGHTS.

Defendant in this case is a holder of a valid class-C liquor license with an entertainment permit issued by the Michigan Liquor Control Commission. The two together constitute one license pursuant to the Administrative Procedures Act of 1969.11 That license and permit otherwise allow the Defendant to present topless performance dance entertainment on its premises. It is well settled law in Michigan that a liquor license holder has property rights in such a license, subject to the protection of the Fifth Amendment due process and takings clause. **Bundo v.**

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11 Section 5(1) of the APA provides "licenses" include the whole or part of any agency, permit, certificate, approval, registration, charter, or other similar form of permission required by law, but does not include a license required solely for revenue purposes or license or registration issued under Act 300 of the Public Act of 1949, as amended, being sections 257. 1 through 257.923 of the Compiled Laws of 1948.

Walled Lake, 395 Mich. 679, 238 N.W.2d 154 (1976), **Bisco's Inc. v. Liquor Control Commission**, 395 Mich. 706, 238 N.W.2d 166 (1976) [holding that a liquor license holder has an "interest" in "property" such that he is entitled to due process] 12 See also, **Cleveland v. United States**, 121 S . Ct. 365 , 374 (2000). Moreover, the Supreme Court has upheld a broad interpretation of such property rights by stating the property interests are subject to procedural due process protection and are "not limited by a few rigid technical forms. " **Board of Regents v. Roth**, 408 U.S. 564, 571-572, 92 S.Ct. 2694, 2706-2707, 33 L.Ed.2d 548 (1972). Rather,"property" denotes a broad range of interests that are secured by "existing rules or understanding." **Perry v. Sinderman,** 418 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972).

In this case, the Township previously has approved the Defendant's liquor license and entertainment permit which provided Defendant the opportunity to provide topless entertainment at it's facility. The liquor license and entertainment permit had been re-approved, many times, by the Township and the Michigan Liquor Control Commission.

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12 The Seventh Circuit U.S. Court of Appeals has held that when local legislators, judicial officers and municipal employees destroy the value of a liquor license business and force the owners to ultimately give up the license, licensees are "deprived" of their property rights in the license even though the license was never actually revoked. **Reed v. Village of Shorewood,** 704 F.2d 943 (7th Cir. 1983)

These permits allowed Defendant to engage in the performance of topless adult entertainment at its liquor licensed establishment, which it had been doing for many years. By passing the anti-nudity ordinance herein and asking for **a summary judgment** to grant a **permanent injunction**, the Township has usurped the value of this liquor license by destroying its value to the extent that it previously had permitted constitutionally protected expressive activities at this location. In reliance upon the licenses and permits, Defendant has made substantial investments in property, all of which would be destroyed or greatly impaired, by the enforcement of these ordinances. As a result, the value of the Defendant's liquor licensing, which permitted topless entertainment, has been taken by the Township without either due process13 or just compensation. Therefore, the ordinance (at least as applied to this Defendant), is invalid as violative of due process.

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13 In **Bundo,** the Michigan Supreme Court defined the due process required as "(1) timely written notice detailing the reasons for the proposed administrative actions; (2) ineffective opportunity to defend by confronting any adverse witness and by being allowed to present in person, witnesses, evidence and arguments; (3) a written although relatively informal, statement of findings." **Bundo**, 395 Mich. at 697-698 (1976).

I. THE CHARGING ORDINANCE IS UNCONSTITUTIONALLY VAGUE.

It is axiomatic that statutes which are vague, andwhich are not subject to reasonable interpretation by common men, inherently deny due process and are therefore unconstitutional. **Grayned v. City of Rockford**, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). To be constitutional, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. **" Grayned, 408 U.S. at 108; Kolender v. Lawson,** 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). More importantly here, as the Supreme Court has noted, constitutional concerns are heightened when a vague statute "abuts upon sensitive areas of basic First Amendment freedoms, " as such a law:

> " . . .'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to `steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned, 408 U.S. at 109. Succinctly put, **precision in draftsmanship** is the touchstone of constitutionality for a regulation which impacts upon First Amendment rights. See, e.g. , **Keyishianv. Board of Regents**, 385 U.S. 589, 603-04, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

In addition to these concerns, there is an additional

component to the vagueness doctrine. In **Kolender**, the Supreme Court observed that:

> " . . .the more important aspect of the vagueness doctrine `is not actual notice [to the accused] , but the other principal element of the doctrine - **the requirement that a legislature establish minimal guidelines to govern law enforcement.**'..... Where the legislature fails to provide such minimal - guidelines, a criminal statute may permit a standard less sweep [that] allows policeman, prosecutors, and juries **to pursue their personal predilections."**

Kolender, 46 1 U. S . at 358 (emphasis added, clarification added and in original).

The vagueness of this ordinance is multi-fold. Primarily, the problem of interpretation arises with the term "nudity, " which is defined as the exposure of certain body parts "either directly or indirectly, including but not limited to exposure, see-through clothing articles, or body stockings.... . "What does "directly or indirectly" mean? In addition, and more importantly, what does the phrase "including but not limited to . . . " mean? This certainly gives the distinct impression that there are matters not specifically included in the definition that fall within the proscriptions of the ordinance, but we are not told what they might be. And, these two vague phrases become even more so when they are put

together in the definition of "nudity. " Certainly, there is not "precision in draftsmanship" of this ordinance; there are no specific guidelines to govern law enforcement, a person of ordinary intelligence does not know what is specifically prohibited, and the regulation acts as a chill on constitutionally protected expressive rights14.

V. CONCLUSION

This Court should deny Plaintiff's motion.

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14 The actual proscription section of the ordinance is also unconstitutional in utilizing the words "frequent" and "loiter. " An individual who wishes to relieve him or herself is "frequenting" the bathroom, yet is this really what the ordinance attempts to proscribe? In regard to the fact that these provisions are impermissibly vague, this Court is referred to the recent decision of the United States Supreme Court in **Chicago v. Morales**, 119 S.Ct.1849, 1861-62 (1999) (ruling as unconstitutionally vague a "loitering" ordinance directed at criminal street gang members, which even had a specific definition as to what the word "loitering" meant).

Dated: 11-21-01

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
Plaintiff,

vs.

CASE NO.: OO-036479-CZ
HON. JEANNE STEMPIEN

THE GARTER BELT, INC., a Michigan corporation, d/b/a LEGG'S LOUNGE,
Defendant.

AFFIDAVIT OF
DR. DANIEL LINZ

_____/

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AFFIDAVIT OF DR. DANIEL LINZ

Dr. Daniel Linz, being first duly sworn, deposes and says:

1. I am a Professor in the Department of Communication and Law and Society Program at the University of California, Santa Barbara, and I am also the Director of the University of California, Santa Barbara, Survey Research Center. I have degrees in both sociology and psychology, and I teach, among other things, research methodology. My curriculum vitae is attached hereto, and accurately reflects my teaching positions, the honors and awards that I have received, the papers that I have either authored or co-authored which have been published in peer-reviewed journals, my professional activities, research grants that I have received, professional conferences where I have presented various papers, invited addresses where I have spoken, and public testimony that I have given. Two of my areas of concentration concern violence in the media and its effects on both adults and children, and the effects of sexually-related expression.

2. Within the last five years, I have undertaken numerous research inquiries concerning the supposed "secondary effects" of what are generally referred to as "adult" entertainment establishments. These include adult bookstores and exotic dance facilities, some of which serve alcoholic beverages and some of which

do not (the latter of which are generally referred to in the industry as " juice bars").

3. My research in the area of secondary effects has included attempts to compile and critically analyze most if not all of the "secondary effects studies" which are referred to in case law and which are generally referred to in preambles to laws which attempt to, in one fashion or another, regulate and/or license "adult" entertainment facilities.

4. I initially collected some one-hundred twenty supposed "studies," and analyzed them both in regard to the conclusions that they reached and for what I generally refer to as "methodological rigor." As part of my research, I wanted to insure that if studies reached a certain Conclusion (regardless of whether they found or did not find "secondary effects" being associated with "adult" entertainment businesses), that I or others could have some confidence in those results as being trustworthy and reliable. I therefore undertook, along with my assistant, Ph.D. candidate Bryant Paul, a critical examination of the methodology or methodologies employed in these various "studies" in order to determine whether they met the rudimentary scientific elements of trustworthiness. While I have reached certain conclusions in regard to my review of these studies and have authored and published certain papers in regard to that initial body of research, I continue to receive, review, and analyze additional secondary effects "studies" and information as new

materials become available, and the opinions that I present to this Court below are based upon the totality of my research.

5. In addition to my review and analysis of these existing "studies" and papers, I have further conducted and/or overseen research projects examining the question of whether, in particular, exotic dance establishments that serve alcoholic beverages create the type of "secondary effects" referred to in the case law; such as increases in crime, decreases in property values, and increases in urban blight. These research projects, conducted in accordance with sound scientific research principles, find no connection whatsoever between the presence of exotic dance clubs that serve alcoholic beverages and the presence of "secondary effects," and include studies undertaken in Charlotte/ Mecklenburg County, North Carolina, and Ft. Wayne, Indiana. These conclusions are in conformity with the results found from other "governmental" secondary effects studies.

6. When my and Mr. Paul's initial review and analyzation of the large body of secondary effects studies and information was completed, we prepared a paper in regard to our observations that was submitted as part of an Amicus Curiae brief on behalf of the First Amendment Lawyers' Association to the United States Supreme Court for its consideration in the case of City of Erie v. Pap's, A.M., ultimately published at 120 S. Ct. 1382 (2000). In that case, I was not retained

by the respondent, Pap's, AM, to undertake any particularized research in the City of Erie, Pennsylvania. Rather, I merely provided my observations and conclusions to the amicus curiae First Amendments Lawyers' Association. The comments of Justice O'Connor, as author of the four-member plurality opinion, and of Justice Souter in his partial concurrence and partial dissent, are referring to my paper attached to the First Amendment Lawyers' Association brief.

7. Following presentation ofthat information to the Supreme Court, we presented our findings in a paper submitted at the Annual Meeting of the International Communication Association, 2000, with that paper receiving a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. Our analysis was then subjected to further peer-review, and was ultimately published as a paper entitled Governmental Regulation of "Adult" Business Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, Communication Law & Policy, Vol. 6, No. 2, Spring, 2001, pp. 355-391. I have attached a copy ofthat published paper for this Court's review, which further substantiates the absence of demonstrable "secondary effects" in regard to the existence of adult entertainment facilities in general, and exotic dance clubs serving alcoholic beverages in particular (see, e.g., p. 337 dealing with the St. Paul, Minnesota 1978 Study). That paper also describes the criteria that Mr. Paul and I

utilized in analyzing these studies, and the factors which we believe must be present in such a study or report in order for the findings to have the most basic elements of trustworthiness and/or reliability.

8. In addition to my review of the existing secondary effects "studies" and information, and a number of studies that I have either conducted or have overseen in regard to examining whether "adult" entertainment facilities engender negative secondary effects, I have also been provided and have reviewed in regard to this affidavit, excerpts of the deposition testimony of Joannie Payne, Cindy King, and Bryce Kelly taken in this case. I have also been provided with Van Buren Township Ordinance 2-16-99(2). I should also point out, as I believe it to be directly relative to the opinions that I will express below, that I have reviewed all of the "secondary effects" studies referred to by the Eleventh Circuit United States Court of Appeals in the case of **Flannigan's Enterprises, Inc. v. Fulton County,** 242 F.3d 976 (11th Cir. 2001).

9. In regard to all of my research in the area of "secondary effects" which I have set forth above, it is my opinion that there is absolutely no properly conducted studies or research that establish or demonstrate that exotic dance clubs which serve alcoholic beverages engender sufficient "secondary effects" so as to warrant the enactment of an anti-nudity law such as Van Buren Township Ord. 2-16-99(2).

In fact, the research appears to be just to the contrary. A 1978 St. Paul, Minnesota, governmentally conducted study illustrated that alcohol-serving exotic dance facilities actually had **less** crime and other "secondary effects" associated with them than did simple "bars" and taverns which did not provide any form of "adult" entertainment. This result is confirmed not only by my own research, but also by the research undertaken both by the government and by private individuals as reported in the **Flannigan's Enterprises** case.

10. Simply put, from my review of all of the literature and my own research, I find no information that I believe Van Buren Township **could have** reasonably relied upon in enacting Ord. 2-16-99(2) as a method to reduce or ameliorate supposed "secondary effects" associated with "adult" entertainment facilities. More to the point, it is clear to me from the testimony in this case that I have referred to above that there was nothing at all that Van Buren Township relied upon in enacting that ordinance.

11. From my review of the existing literature and research, and my review of the testimony in this case, I find no "**evidence**," in the language of the Supreme Court in **Renton v. Playtime Theatres, Inc**., 475 U.S. 41 (1986), that Van Buren Township "relied upon" which was "reasonably believed to be relevant" to the problem that the Township was attempting to

address.

Further deponent sayeth not.

Dr. Daniel Linz

Dr. Daniel Linz

Subscribed and sworn to before me this 27th day of November, 2001, by Dr. Daniel Linz

Philip James Thompson, Notary Public

Philip James Thompson, Notary Public Santa Barbara County, California My Commission Expires: 11/19/04

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Religious freedom; freedom of speech and press; right to peaceably assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives - Power to reduce appointment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime,

the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned-Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TWENTY-FIRST AMENDMENT

Section 1. Repeal of Eighteenth Amendment.

The eighteenth article of amendment to the Constitution of United States is hereby repealed.

Sec. 2. Intoxicating liquors, shipment into dry territory prohibited.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. Ratification, time limit.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided int he Constitution, within seven years from the date of the submission hereof to the States by the Congress.

CHARTER TOWNSHIP OF VAN BUREN
ORDINANCE NO. 2-16-99 (2)

The Charter Township of Van Buren Orders:

That the Code of Ordinances, Charter Township of Van Buren, Michigan, is hereby amended by adding a section, to be numbered 6-69, which section shall read as follows:

Sec. 6-69 Nudity on Licensed Premises.

(1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment, licensed or subject to licensing by the Michigan Liquor control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

(2) "nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(a) the whole or part of the pubic region;
(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one-half of the area of the breast.

(3) Every word, sentence, clause and provision of thes section is hereby declared to be severable, and if any word, sentence, clause, provision or part thereof is declared to be invalid by a court of competent jurisdiction, the remaining provisions shall not be affected.

(4) The provisions of any or all code sections or subparts thereof in conflict herewith are repealed only to the extent necessary to give this section full force and effect.

(6) the provisions of this section shall become effective upon its passage by the VanBuren Charter Township Board of Trustees and upon publication in accordance with the Township Charter and the statutes of the State of Michigan.

Yea HART, CLARK, BUDD, KING, FOSTER AND HERMAN.
Nay NONE
Absent ROCHOWIAK

Ordinance Declared Adopted:

_____
Cindy King, Township Clerk

_____
Helen Foster, Supervisor

Adopted: 03-02-99
Published: 02-25-99 & 3-11-99
Effective: 03-11-99

Michigan Court Rule 2.116. Summary Disposition

(A). Judgment on Stipulated Facts.
(1) The parties to a civil action may submit an agreed upon stipulation of facts to the court.
(2) If the parties have stipulated to facts sufficient to enable the court to render judgment in the action, the court shall do so.
(B) Motion.
(1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary disposition of the defense. A request for dismissal without prejudice under MCL 600.2912c; MSA 27A. 2912c must be made by motion under MCR 2.116 and MCR 2.119.
(2) A motion under this rule may be filed at any time consistent with subrule (D), and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim.
(C)Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
(1) The court lacks jurisdiction over the person or property.
(2) The process issued in the action was insufficient.
(3) The service of process was insufficient.
(4) The court lacks jurisdiction of the subject matter.
(5) The party asserting the claim lacks the legal capacity to sue.
(6) Another action has been initiated between the same parties involving the same claim.
(7) the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.
(8) the opposing party has failed to state a claim on which relief can be granted.

(9) The opposing party has failed to state a valid defense to the claim asserted against him or her.
(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.
(D)Time To Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:
(1) The grounds listed in subrule (C)(1), (2), and (3) must be raised in a party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived.
(2) The grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118.
(3) The grounds listed in subrule (C)(4), (8), (9), and (10) may be raised at any time.
(E) Consolidation; Successive Motions.
(1) A party may combine in a single motion as many defenses or objections as the party has based on any of the grounds enumerated in this rule.
(2) No defense or objection is waived by being joined with one or more other defenses or objections.
(3) A party may file more than one motion under this rule, subject to the provisions of subrule (F).
(F)Motion or Affidavit Filed in Bad Faith. A party or an attorney found by the court to have filed a motion or an affidavit in violation of the provisions of MCR 2.114 may, in addition to the imposition of other penalties prescribed by that rule, be found guilty of contempt.
(G) Affidavits; Hearing.
(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.
(a) Unless a different period is set by the court,
(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the

time set for the hearing, and
(ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.
(b) If the court sets a different time for filing and serving a motion or a response, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.
(c) A copy of a motion or response (including brief and any affidavits) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked. JUDGE'S COPY on the cover sheet; that notation may be handwritten.
(2) Except as to a motion based on subrule (C)(8) or (9), affidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion.
(3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required
(a) when the ground asserted do not appear on the face of the pleadings, or
(b) when judgment is sought based on subrule (C) (10).
(4) A motion under subrule (C) (10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.
(5) the affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when

the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).

(H). Affidavits Unavailable.

(1) A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must

(a) name these persons and state why their testimony cannot be procured, and

(b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

(2) When this kind of affidavit is filed, the court may enter an appropriate order, including an order

(a) denying the motion, or

(b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

(I) Disposition by Court; Immediate Trial.

(1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

(2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

(3) A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may

order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.

(4) the court may postpone until trial the hearing and decision on a matter involving disputed issues of fact brought before it under this rule.

(5) If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.

(J) Motion Denied; Case Not Fully Adjudicated on Motion.

(1) If a motion under this rule is denied, or if the decision does not dispose of the entire action or grant all the relief demanded, the action must proceed to final judgment. The court may:

(a) set the time for further pleadings or amendments required;

(b) examine the evidence before it and, by questioning the attorneys, ascertain what material facts are without substantial controversy, including the extent to which damages are not disputed; and

(c) set the date on which all discovery must be completed.

(2) A party aggrieved by a decision of the court entered under this rule may:

(a) seek interlocutory leave to appeal as provided for by these rules;

(b) claim an immediate appeal as of right if the judgment entered by the court constitutes a final judgment under MCR 2.604(B); or

(c) proceed to final judgment and raise errors of the court committed under this rule in an appeal taken from final judgment.

Supreme Court, U.S.
FILED
OCT 29 2004
OFFICE OF THE CLERK

No. 04-426

IN THE

Supreme Court of the United States

THE GARTER BELT, INC.,
a Michigan Corporation d/b/a Legg's Lounge,

Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Michigan Court of Appeals err in rejecting a constitutional First Amendment challenge against enforcement of a township ordinance prohibiting nudity in any establishment regulated by the Michigan Liquor Control Commission and prohibiting the proprietor or operator of such an establishment from allowing such conduct?

Did the Michigan Court of Appeals err in rejecting a challenge to an ordinance for overbreath and vagueness?

Did the Michigan Court of Appeals err in affirming a judgment and permanent injunction that grants summary judgment in favor of the Township and against The Garter Belt, Inc. d/b/a Legg's Lounge and permanently enjoins it from violating the Township's ordinance prohibiting nudity in liquor-licensed premises in the future?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. THE DECISION OF THE MICHIGAN COURT OF APPEALS THAT ENFORCEMENT OF A TOWNSHIP ORDINANCE BANNING NUDITY ON PREMISES LICENSED TO SERVE LIQUOR IS CONSISTENT WITH THIS COURT'S PRECEDENT.	4
II. THE DECISION OF THE MICHIGAN COURT OF APPEALS THAT RESPONDENT CHARTER TOWNSHIP OF VAN BUREN'S ORDINANCE BANNING NUDITY IN ESTABLISHMENTS THAT ARE LICENSED BY THE MICHIGAN LIQUOR CONTROL COMMISSION IS NOT OVERLY BROAD OR VAGUE UNDER THE FIRST AMENDMENT AND FOLLOWS FEDERAL PRECEDENT SET BY THIS COURT.	17

Contents

Page

III. INJUNCTIVE RELIEF TO ENSURE ENFORCEMENT OF AN ORDINANCE BANNING NUDITY IN PLACES WHERE LIQUOR IS SOLD DOES NOT AMOUNT TO PRIOR RESTRAINT. 22

CONCLUSION 28

TABLE OF CITED AUTHORITIES

Page

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Charter Township of Van Buren v. Garter Belt Inc.,
258 Mich. App. 594, 673 N.W.2d 111 (2003) ... 18

Jott, Inc. v. Charter Township of Clinton,
224 Mich. App. 513, 569 N.W.2d 841 (1997) ... 2, 3

FEDERAL CASES

44 Liquor Mart, Inc. v. Rhode Island,
517 U.S. 484, 115 S. Ct. 1495, 134 L. Ed. 2d 711
(1996) ..... *passim*

Alexander v. United States,
509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441
(1993) 22

Barnes v. Glen Theatre, Inc.,
501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504
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Page

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527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67
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529 U.S. 277, 120 S. Ct. 1382, 191 L. Ed. 2d 265
(2000) 12

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486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771
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City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670
(2002) 12, 13

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479 U.S. 92, 107 S. Ct. 383, 93 L.Ed. 2d 334
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107 F.3d 403 (6th Cir. 1997) 13

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Page

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422 U.S. 922, 95 S. Ct. 2561, 45 L.Ed. 2d 648
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285 F.3d 1272 (10th Cir. 2002) 13

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408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222
(1972) 22

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530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597
(2000) 21, 22

Hostetter v. D. Idlewild Liquor Corp.,
377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 350
(1964) 5

J&B Entertainment, Inc. v. City of Jackson,
152 F.3d 362 (5th Cir. 1998) 13

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194 F.R.D. 589 (N.D. Ohio 2000) 19, 20, 21

Kunz v. New York,
340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951)
..... 26

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459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297
(1982) 10

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Page

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466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772
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452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357
(1981) 5, 8, 9

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340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1951)
..... 26

Organization For A Better Austin v. Keefe,
402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1
(1971) 24

Renton v. Playtime Theatres, Inc.,
475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29
(1986) 12, 13, 15

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334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574
(1948) 26

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394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162
(1968) 22-23

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Page

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376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608
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880 F.2d 40 (8th Cir. 1988), *cert. denied* 493 U.S.
1023 (1990) 16

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359 U.S. 180, 79 S. Ct. 710, 3 L. Ed. 2d 723
(1959) 16

Triplett Grille, Inc. v. City of Akron,
40 F.3d 129 (6th Cir. 1994) 19

United States v. O'Brien,
391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672
(1968) 13

United States v. Raines,
362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524
(1960) 22

Vance v. Universal Amusement Co., Inc.,
445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413
(1980) 24, 25

Ward v. Rock Against Racism,
491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661
(1989) 23, 24

Ziffrin, Inc. v. Reeves,
308 U.S. 132, 60 S. Ct. 163, 84 L. Ed. 2d 128
(1939) 5

Cited Authorities

Page

OUT-OF-STATE CASES

Cochran v. Tory,
2003 Cal. App. LEXIS 10227 (2003) *cert. granted*
159 L. Ed. 2d 856 (2004) 26, 27

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 3

U.S. Const. amend. XXI ..... *passim*

LEGAL TREATISES AND TEXTS

Stevens, Some Thoughts on Judicial Restraint,
66 Judicature 177 (1982) 17

STATEMENT OF THE CASE

The Charter Township of Van Buren commenced this action on November 6, 2000. It sought to enjoin direct violations of its ordinances by defendant Garter Belt, Inc. Since the late 1970's or early 1980's, Garter Belt has operated and continues to operate a topless bar in the Township doing business as Legg's Lounge. Since it has been in business, Garter Belt has also been licensed by the Michigan Liquor Control Commission to sell alcoholic beverages to patrons of its Legg's Lounge on the premises. (Pet. App., 55a, 57a, Complaint, 11/6/00, ¶8).

Over the last several years, the Van Buren Township has been in the process of a complete land use review that has included revisions to its master plan, zoning ordinances, and zoning classifications. That review and revision process began on August 27, 1997 when the Township's planning commission authorized implementation of the process. As it relates to the subject matter of this case, the Township's land use review and revision process lasted until 1999, when the Township, effective March 11, 1999, adopted new land use regulations and zoning ordinances that included a package of new and revised ordinances addressing what are called sexually-oriented businesses—"SOBs" (Pet. App., 57a, Complaint, ¶10).

The package of SOB ordinances adopted by the Van Buren Township's Board of Trustees and effective following publication on March 11, 1999, contains Ordinance Section 6-69 of the Charter Township of Van Buren Code of Ordinances. It is entitled "Nudity on Licensed Premises." This is the only ordinance enforced or in any way at issue in this case. In full substantive part, the ordinance states as follows:

> (1) No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow

> the presence in such establishment of any person who violates the provisions of this section.
>
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
>
> (a) the whole or part of the pubic region;
>
> (b) the whole or part of the anus;
>
> (c) the whole or part of the buttocks;
>
> (d) the whole or part of the genitals;
>
> (e) the breast area including nipple, or more than one-half of the area of the breast. (Pet. App., 176a).[1]

In the Legg's Lounge, female dancers regularly expose for view their "breast area including nipple, or more than one-half of the area of the breast," while patrons of the bar are sold, served and consume alcoholic beverages—this is uncontested. (Pet. App., 58a, 59a, Complaint, ¶¶11, 13). On August 29, 2000, Van Buren Township, through its Director of Planning and Development, sent a letter to the owner of the Garter Belt and informed him that Garter Belt was in violation of various ordinances of the Township regulating sexually-oriented businesses, including the nudity-on-licensed-premises ordinance. (Pet. App., 59a, ¶15). By the same letter, Van Buren Township requested that the Garter Belt stop violating the ordinance. (*Id.*)

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1. An ordinance of almost identical language to that in question here was adopted by the Charter Township of Clinton, Michigan. The ordinance adopted by Clinton Township was challenged on the same constitutional and other grounds as the defendant here challenges the Van Buren Township's nudity-on-licensed-premises ordinance. The result was the decision in *Jott, Inc. v. Charter Township of Clinton*, 224 Mich. App. 513, 569 N.W.2d 841 (1997).

Meetings were had and letters exchanged between counsel for the Township and the lounge in attempts to resolve this matter short of litigation. Those efforts were not fruitful. (Pet. App., 59a, ¶16). When Garter Belt continued in its direct violation of the ordinance in question, the Township filed this action on November 6, 2000. Van Buren Township also filed a motion for preliminary injunction. (Motion to Show Cause; 11/6/00).

Garter Belt answered the complaint on 11/30/00. Doing so, it raised various defenses under the Michigan equivalent of the First Amendment to the United States Constitution. (Pet. App., 62a, Answer and Affirmative Defenses, 11/30/00; Pet. App., 66a, Affirmative Defense Nos. 5-10, 13). Garter Belt likewise averred that the Township's Ordinance was preempted by certain state laws. Following an unsuccessful attempt at removal of the case to federal district court, Garter Belt filed a counter-claim. There, it raised arguments under the First and Fourteenth Amendments to the United States Constitution. (Pet. App., 70a, Counter-Complaint, 10/1/01). The parties engaged in extensive discovery.

In turn, the Township brought a motion for summary disposition. Garter Belt opposed the motion. The trial court granted that motion following a hearing held on November 30, 2001. (Transcript, 11/30/01, pp 15-16). In ruling in favor of the Township, the trial court determined that there was no genuine issue of material fact and relied upon the holding in *Jott, Inc. v. Charter Township of Clinton*, 224 Mich. App. 513, 569 N.W.2d 841 (1997) stating that the issue was whether there was a rational basis for the legislative action. (Transcript, 11/30/01, pp 15-16). Subsequently, on December 14, 2001, the trial court entertained oral arguments on Garter Belt's motion to disqualify the trial judge. The trial court denied the motion. (Transcript, 12/14/01, p 5). Upon de novo review, the chief judge also denied disqualification. (Transcript, 12/20/01, p 19).

Upon immediate consideration, the Michigan Court of Appeals denied Garter Belt's motion for stay pending appeal and declined Garter Belt's request for reconsideration of the stay ruling. (Pet. App., 40a, 39a, Orders, 12/28/01 and 1/9/02). The Michigan Supreme Court likewise denied a stay and declined to grant Garter Belt's application for leave to appeal prior to a decision by the Michigan Court of Appeals. (Pet. App., 37a, Supreme Court No. 120762; 1/23/02).

Following oral arguments on September 16, 2003, the Michigan Court of Appeals issued its published opinion on September 25, 2003. (Pet. App., 2a, Michigan Court of Appeals No. 23851). There, the court of appeals affirmed the trial court's summary disposition ruling in favor of the Township as well as the permanent injunction enforcing Van Buren Township's ordinance prohibiting nudity at liquor-licensed establishments. (*Id.*). Garter Belt then sought leave to appeal to the Michigan Supreme Court. In its order of June 24, 2004, the supreme court denied Garter Belt's application for leave to appeal the September 25, 2003 judgment of the court of appeals. (Pet. App., 1a, Michigan Supreme Court No. 124831).

REASONS FOR DENYING THE PETITION

I. The Decision Of The Michigan Court Of Appeals That Enforcement Of A Township Ordinance Banning Nudity On Premises Licensed To Serve Liquor Is Consistent With This Court's Precedent.

Van Buren Township's Ordinance § 6-69 prohibits nudity in any establishment licensed or subject to license by the Michigan Liquor Control Commission. It is a content-neutral regulation since it prohibits nudity on all licensed premises. As such, any constitutional challenges leveled at the Township's ordinance are properly considered under the relaxed rational basis standard. Analysis should also take into account a state's right to regulate liquor.

A state has absolute power under the Twenty-First Amendment[2] to totally prohibit the sale of liquor within its boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S. Ct. 163, 84 L. Ed. 2d 128 (1939). It is equally well established that a state has broad power under the Twenty-First Amendment to regulate the times, places, and circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981). The Twenty-First Amendment gives broad regulatory power to the states and generally they may delegate this power as they see fit. *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 107 S. Ct. 383, 93 L. Ed. 2d 334 (1986). It has been said about the broad powers of the Twenty-First Amendment that they confer something more than the normal state authority over public health, welfare, and morals, *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972) and *Hostetter v. D. Idlewild Liquor Corp.*, 377 U.S. 324, 330, 84 S. Ct. 1293, 12 L. Ed. 2d 350 (1964). Thus, while the reach of the Twenty-First Amendment is certainly not without limit, this Court's previous decisions have repeatedly declared that, in the context of liquor licensing, the Twenty-First Amendment confers broad regulatory powers on the state. *Iacobucci*, *supra*.

Accordingly, consideration of any state law regulating intoxicating beverages must begin with the Twenty-First Amendment. Thereunder, wide latitude as to the choice of means to accomplish a permissible end must be accorded to a state agency that is itself the repository of the power under the Twenty-First Amendment, *LaRue*, *supra*. That being the situation, the *LaRue* court upheld the facial constitutionality of a state regulation prohibiting acts of "gross sexuality" and live or filmed performances of sexual acts in establishments licensed by the state to serve liquor. Although the court recognized that not all

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2. The Twenty-First Amendment provides in relevant part that: "[the]transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

prohibited acts would be found obscene and were thus entitled to some measure of protection under the First Amendment, the challenged statute was within the state's broad power under the Twenty-First Amendment to regulate the sale of liquor. Upholding the regulations before it, the *LaRue* court said as follows:

> The substance of the regulation struck down prohibits licensed bars or night clubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.
>
> Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troop in a theatre.
>
> The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur

> at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the 21st Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.

409 U.S. 109, 118-19.

In subsequent decisions, the Court reaffirmed its *LaRue* holding. For example, in *Doran v. The Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975), the Court considered a First Amendment challenge to an ordinance that prohibited females from appearing topless not just in bars but in "any public place." The Court upheld a preliminary injunction against the enforcement of the ordinance banning topless dancing. Doing so, however, the court invoked the rule of *LaRue*, *supra* to the effect that the broad powers of the states to regulate the sale of liquor as conferred by the Twenty-First Amendment outweigh any first amendment interest in nude dancing such that a state could, therefore, ban such dancing as part of its liquor license program. As the *Doran* court explicitly recognized, a more narrowly drawn statute would survive judicial scrutiny under the Twenty-First Amendment:

> Although the customary "bar room" type of nude dancing may involve the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of this State's to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program.

422 U.S. at 932-33.

In *New York State Liquor Authority v. Bellanca*, *supra*, the Court considered a First Amendment challenge to a New York liquor law banning nude dancing at establishments licensed to sell liquor for consumption on the premises. Based on that scenario, the court reviewed its decisions in *LaRue*, *supra*, and *Doran*, *supra*, and found that the state's conduct was authorized. Under the Twenty-First Amendment, New York possessed the power to ban the sale of alcoholic beverages. It could also ban the sale of liquor on premises where topless dancing occurred. The state's power to ban the sale of alcoholic beverages entirely included the lesser power to prohibit the sale of liquor on premises where topless dancing occurs. The fact that New York chose to avoid disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption was entirely appropriate. Accordingly, given the added presumption in favor of the validity of state regulation as conferred by the Twenty-First Amendment, the *Bellanca* court determined that New York's policy choice did not violate the United States Constitution:

> In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favor of the validity of the state regulations" conferred by the Twenty-First Amendment, *California v. LaRue*, 409 U.S., at 118, we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-First Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a

> harmless diversion, the Twenty-First Amendment makes that a policy judgment for the state legislature, not the courts.

452 U.S. 714, 718.

Last, in *City of Newport, Kentucky v. Iacobucci, supra*, the City enacted an ordinance that prohibited nude or nearly-nude dancing in local establishments licensed to sell liquor for consumption on the premises. Finding that the *Bellanca* case controlled inasmuch as the authority under the Twenty-First Amendment extended to a City, the *Iacobucci* court reiterated that, while the reach of the Twenty-First Amendment is certainly not without limit, prior decisions have established that, in the control of liquor licensing, the Amendment confers broad regulatory powers on the states. 479 U.S. at 94-95. Thus, the states have full authority to regulate the times, places, and circumstances under which liquor may be sold. The court has never attached any constitutional significance to a state's division of its authority over alcohol. The Twenty-First Amendment gives broad powers to the states and to those entities to whom they delegate their power as they see fit. It was plain to the *Iacobucci* court that the interest in maintaining order outweighed the interest in the expression by dancing nude and that any delegation of the power to the electorate to decide if liquor could be served in different establishments did not change the result.

Petitioner insists that this Court implicitly overruled *LaRue* in *44 Liquor Mart, Inc. v. Rhode Island*, 517 U.S. 484, 115 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). A careful review of the opinion reveals the lack of merit in that suggestion. Before the court in *44 Liquor Mart* were two separate prohibitions enacted by the Rhode Island legislature. The first applied to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibited them from advertising in any manner whatsoever the price of any alcoholic beverage offered for sale in Rhode Island. The second statute applied to the Rhode Island news media. It contained a categorical

prohibition against the publication or broadcast of any advertisements that "make reference to the price of any alcoholic beverages." The Court granted leave to appeal to address both the First Amendment issue *as well* as the suggested relevance of the Twenty-First Amendment. Even under the less than strict standard generally applicable in commercial speech cases, the Court found that the state failed to establish a "reasonable fit" between its abridgement of speech and its temperance goal. 517 U.S. at 507. Thus, the Court necessarily held that the price-advertising ban could not survive more stringent constitutional review. 517 U.S. at 508.

From there, while discussing the impact of the Twenty-First Amendment and the Court's earlier *LaRue* decision, the *44 Liquor Mart* court noted that it had been persuaded that the analysis in *LaRue* would have led to precisely the same result even if no reliance had been placed on the Twenty-First Amendment. Without questioning the holding in *LaRue*, the *44 Liquor Mart* court disallowed the reasoning employed there insofar as it relied on the Twenty-First Amendment. It said that, although the Twenty-First Amendment limits the effect of the dormant commerce clause on a state's regulatory power over the delivery or the use of intoxicating beverages within its borders, the amendment does not license the states to ignore their obligations under other provisions of the Constitution. Stated otherwise, the Twenty-First Amendment does not in any way diminish the force of the supremacy clause (*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-14, 100 S. Ct. 937, 63 L. Ed. 2d 233 [1980]) of the establishment clause (*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5, 103 S. Ct. 505, 74 L. Ed. 2d 297 [1982]), or of the equal protection clause (*Craig v. Boren*, 429 U.S. 190, 209, 97 S. Ct. 451, 50 L. Ed. 2d 397 [1976]). The *44 Liquor Mart* court saw no reason why the First Amendment should not also be included in that list. Accordingly, the *44 Liquor Mart* court held that the Twenty-First Amendment does not nullify the constitutional prohibition against laws abridging freedom

of speech as embodied in the First Amendment. The Twenty-First Amendment could not save Rhode Island's ban on liquor price advertising. Thus, to the extent that the *44 Liquor Mart* court retreated from the holding in *LaRue*, *supra*, it did so only insofar as *LaRue* advanced the proposition that the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment may be shielded from attack by the Twenty-First Amendment. While so holding, the *44 Liquor Mart* court nevertheless emphasized that, on account of a State's ample powers to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of sexual activities described in *LaRue*, the *LaRue* analysis would have yielded the same result independent of the Twenty-First Amendment.

Significantly, the *44 Liquor Mart* court did not question or tamper with the holding in *LaRue*, *supra*. At best, the *44 Liquor Mart* court disavowed the *LaRue* reasoning insofar as it relied on the involvement and application of the Twenty-First Amendment. However, because of the ample power vested in a state to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of activities described in *LaRue*, the *44 Liquor Mart* court utilized that same rational basis standard of review to find that a state's inherent police powers provided ample authority for the ban on the advertisements containing accurate information about retail prices of alcoholic beverages. The inherent police powers vested in a state are all that is needed to restrict the kind of behavior described in *LaRue*. That, no doubt, explains the absence of any statement by the *44 Liquor Mart* court that a higher level of scrutiny than rational basis is required when reviewing a state's ~~exercise~~ of its police power under the Twenty-First Amendment to regulate appropriate places to sell alcohol.

The essence of the *44 Liquor Mart* holding is "that a state's inherent police powers derived from the Twenty-First Amendment to prohibit, restrict, or limit the sale of alcoholic beverages in inappropriate locations is sufficient to prompt application of the rational basis standard of review." Thus, the

Michigan Court of Appeals decision is not inconsistent with *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 191 L. Ed. 2d 265 (2000) and the *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). In the former, the subject restriction did not address where alcohol may be sold but concerned a community-wide ban on nudity similar to that found in *Doran, supra*. As such, the case did not call into question the state's exercise of its police power to regulate the sale of alcoholic beverages and conduct that occurs in liquor-licensed premises. As to the *Alameda Books* case, the question before the court was whether the City of Los Angeles could rely upon a 1977 study of crime to justify its zoning restrictions on adult entertainment businesses. The Court used the opportunity to clarify the standard of review for content-neutral time, place, and manner regulations designed to combat adverse secondary effects of businesses that portray sexually explicit materials. The Court allowed the city to rely upon its 1977 study because it supported the city's theory that a concentration of adult operations in one locale attracts crime. The rule to be derived from the *Alameda Books* case is that any governmental unit is entitled to rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and the substantial independent government interest.

Garter Belt criticizes the Township for failing to offer evidence that it relied on adverse secondary effects when it adopted its ordinance. (Petition, p. 9). But this argument is based on a misunderstanding of the correct analysis of the requirements. A municipality is "not required to conduct new studies or produce evidence independent of that generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). The focus of any inquiry into a statute or ordinance such as this is "not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or non-existence of a current

governmental interest in the service of which the challenged application may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).

The Court has declined "to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Federal courts have also concluded that evidence of secondary effects occurring even years after the enactment of an ordinance may be used to demonstrate a substantial governmental interest in limiting those secondary effects. *See, e.g., Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997); *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371-72 (5th Cir. 1998). Petitioner seeks to challenge the ordinance but fails to address the Township's knowledge of what has taken place in and around nude dancing establishments in southeastern Michigan. Unless a challenger succeeds in casting doubt on a municipality's rationale, by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes a municipality's findings, the municipality meets the standard set forth in *Renton. City of Los Angeles v. Alameda Books*, 535 U.S. 425, 439-39, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). The petitioner has not done so.

The Township thoroughly investigated the adverse secondary effects of nudity on liquor-licensed premises before adopting its ordinance. It examined several reports and memoranda from its planner, McKenna Associates, Inc. As part of its evaluation for updating its ordinance, the Township's development director also conducted a study comparing, over a nine-year period, the number of calls for police services to Legg's Lounge with a similarly situated commercial shopping plaza containing a number of businesses but no nude dancing or topless entertainment. The Township determined that the number of calls was more than 30% more calls. (Exhibit C to Motion for

Summary Disposition, Kelley Deposition, 7/25/02. pp 20-22). This history of adverse secondary effects from the existence of a topless bar in which nudity is allowed, in part, prompted the Township to adopt its ordinance. Thus, this argument provides no basis for granting the petition.[3]

At least two factors warrant the application of the rational basis standard of review. The first is the involvement of the Twenty-First Amendment and the added presumption which it brings in favor of the validity of state regulation of liquor-licensed premises. The second derives from the inherent police powers of a governmental agency to regulate the traffic of liquor within its boundaries and to restrict the kinds of activities associated therewith. Without any aid from the Twenty-First Amendment, the state's ordinary police power are adequate to support the Township's ordinance. *44 Liquor Mart* so held when it pointed out that it would have reached "precisely the same result [in *LaRue*] if it had placed no reliance on the Twenty-First Amendment." 517 U.S. at 515, 116 S. Ct. 1495. Further, the prohibition on nudity applies only to establishments that are licensed by the state to serve liquor.

The above discussion underscores Van Buren Township's position that this case is not an appropriate one for the Court's consideration. The Michigan courts applied the correct law and reached the proper conclusion. Their holding is consistent with the case law authority cited above. Read as a whole, the cases are consistent. They attest to the propriety of the Michigan Courts' utilization of a rational basis standard of review.

Even if required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral, time,

3. In addition, respondent is prepared to lodge with the clerk's office, official court records demonstrating convictions for illicit activities in the very premises at issue here. Thus, as to these premises, the Township can, not only rely on secondary effects as studied by other jurisdictions, but as evidenced by a series of criminal convictions for conduct on the premises. In addition, respondent has requested to lodge with the clerk's office three studies from the township's planner that demonstrate adverse secondary effects.

place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative means of communication, Van Buren Township has met its burden. An ordinance that does not suppress protected forms of sexual expression, but which is designed to combat the undesirable secondary effects of business that accompany such activity is to be reviewed under the standards applicable to content-neutral, time, place, and manner regulations, *Renton v. Playtime Theatres*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). The Michigan Court of Appeals evaluated the ordinance under intermediate scrutiny as well. The court stated, at 22a-23a of cert. petition,

> So, even if plaintiff were required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication, it would have met its burden. Plaintiff could reasonably rely upon the finding adopted by the Supreme Court and by this Court that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca*, *supra*, 452 U.S. at 718; *Jott*, *supra* at 546.
>
> * * *
>
> Finally, even if we apply intermediate level scrutiny to plaintiff's ordinance we still find it is a constitutional content-neutral time, place and manner regulation designed to combat adverse secondary effects of the combination of alcohol and nudity that allows for reasonable alternative avenues of communication. *Iacobucci*, *supra* at 96-97; *Jott*, *supra* at 527, 545-546.

The petition should be denied because, regardless of the standard, the Michigan Court of Appeals has properly concluded

that the ordinance passes constitutional muster. This case would be decided in the same way under the intermediate scrutiny standard.

The claimed conflict in standards pointed to by petitioners is not a sufficient reason for granting review. For example, in *South Dakota v. Kansas City S. Industries, Inc.*, 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990), the Court denied certiorari to resolve a split regarding the standard for the "sham" exception to the *Noerr-Pennington* doctrine where there was an alternate ground for affirming the decision. As the Court stated in *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184, 79 S. Ct. 710, 3 L. Ed. 2d 723 (1959): "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here of the . . . [issue] can await a day when the issue is posed less abstractly." Similarly, the Court has denied certiorari where resolution of even a clear conflict is irrelevant to the ultimate outcome of the case. In *Sommerville v. United States*, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964), certiorari was denied despite the Government's concession that a live conflict existed as to state or federal law controlled the determination of the type of liability in question and that it would be in the interest of the Government to have this recurring and important issue settled. But it was evident that the resolution of the conflict would not change the result below, since the petitioner would be liable under either federal or state law.

The issue presented here is similarly abstract. Michigan's intermediate appellate court analyzed the constitutionality of the challenged-ordinance under both the rational basis and intermediate scrutiny standards. It passes constitutional muster under both standards. Even if this Court deems the question of *LaRue's* viability to be an important issue, certiorari should be denied because the standard will not change the outcome in this case. In addition, the Court has traditionally adhered to a policy of letting tolerable conflicts go unaddressed because

"experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." Justice Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 183 (1982). Petitioner has not pointed to a lengthy history of increasing confusion or conflict between many states or federal intermediate appellate courts, a situation that might present a stronger basis for granting certiorari. Petitioner points only to a claimed conflict between an intermediate state court decision and decisions by this Court and the Sixth Circuit. The decision does not conflict with *LaRue* as refined by *44 Liquor Mart*. Moreover, while the petitioner claims the decision conflicts with decisions of the Sixth Circuit, the petitioner cites none. In addition, the claimed conflict involving the correct standard will not affect the outcome. For all these reasons, certiorari should be denied.

II. The Decision Of The Michigan Court Of Appeals That Respondent Charter Township Of Van Buren's Ordinance Banning Nudity In Establishments That Are Licensed By The Michigan Liquor Control Commission Is Not Overly Broad Or Vague Under The First Amendment And Follows Federal Precedent Set By This Court.

The petitioner's attempt to disguise this constitutional law issue as one that conflicts with this Court's precedent or presents an unsettled issue in the First Amendment arena is misplaced. Rather, the Michigan Court of Appeals' decision that the respondent's ordinance that bans nudity in establishments that are licensed to sell alcohol by the Michigan Liquor Control Commission is neither overly broad or void for vagueness it is commensurate with well-settled principles set forth by this Court. As such, certiorari is unwarranted.

To establish a facial challenge to an ordinance on the ground that it is overbroad requires the challenger to show that there is "a realistic danger that the statute itself will significantly

compromise recognized First Amendment protections of parties not before the Court." *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). The regulation's overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). But, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Los Angeles City Council*, 466 U.S. at 801. This Court has stated that the overbreadth doctrine should be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613.

As the Michigan Court of Appeals properly held, the respondent's ordinance is not unconstitutionally overbroad because there is no real and substantial possibility that it will deter third parties from engaging in protected expressive conduct at establishments that are not licensed to sell liquor. The ordinance expressly limits the ban on nudity to establishments that are licensed to sell liquor, removing any risk that the ban would extend to unlicensed establishments. Consequently, as the Michigan Court of Appeals identified, the ordinance's "plain and legitimate sweep" is to "regulate trafficking in liquor by applying a prophylactic rule banning sexually explicit entertainment at licensed bars, cabarets, or taverns" to accomplish its purpose, "to eradicate the effects of 'undesirable behavior' stemming from a combination of alcohol and nudity." *Charter Township of Van Buren v. Garter Belt Inc.*, 258 Mich. App. 594, 673 N.W.2d 111 (2003).

Moreover, petitioner's concern over a person using the restroom in a liquor licensed establishment is misplaced, as the First Amendment protection at issue governs expressive conduct. As the Michigan Court of Appeals noted, "tavern patrons using restroom facilities are generally not engaged in expressive conduct." *Id.*

Further, the ordinance is unlike the ordinances underlying the two cases upon which petitioner heavily relies, *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) and *J.L. Spoons, Inc. v. O'Connor*, 194 F.R.D. 589 (N.D. Ohio 2000). In *Triplett*, the City of Akron enacted an ordinance that prohibited public nudity in public places.[4] The Akron ordinance contained no limit on the ban to those establishments that are licensed to sell liquor, unlike the instant ordinance.[5] Thus, the Michigan Court of Appeals properly distinguished the two cases.

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4. The ordinance at issue in *Triplett* provided:

> (A) No person shall knowingly or intentionally, in a public place:
>
> (1) Engage in sexual intercourse;
>
> (2) Engage in deviant sexual conduct;
>
> (3) Appear in a state of nudity; or
>
> (4) Fondle the genitals of himself or another person.
>
> (B) For the purpose of this section only, the following definitions shall apply:
>
> "*Nudity*" means the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.
>
> "*Public Place*" means any street, sidewalk, right of way and any public or private building or place where the general public is invited.

Triplett, 40 F.3d at 131 n.2.

5. The *Triplett* court also reasoned that the ordinance was invalid because the challenger established no link between nudity in non-adult entertainment from all public places and secondary effects. Here, respondent's ordinance does not ban nudity from all public places, only liquor licensed establishments, and respondent set forth evidence of secondary effects from nudity shown in liquor-licensed establishments.

In *J.L. Spoons*, the United States District Court for the Northern District of Ohio considered whether the following ordinance was unconstitutionally overbroad:

> (A) Definitions as used in this rule:
>
> (2) "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum, anal region, or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.
>
> (B) Prohibited activities: no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:
>
> (2) Appear in a state of nudity;
>
> (3) Engage in sexual activity as said term is defined in ORC Chapter 2907.

J.L. Spoons, 314 F. Supp. 2d at 751-752, footnote omitted.

The *J.L. Spoons* court invalidated this ordinance because it simply broadened the definition of nudity to include language that prohibited nudity-simulating costumes in liquor licensed establishments:

> By substituting broader language covering non-nude performances, and by failing to in any way address the Court's clearly articulated concern for exempting mainstream artistic performances, the State appears to reach well beyond the realm of speech reasonably associated with the secondary effects it seeks to curtail.

Id. at 760.

The instant ordinance cannot be read so broadly to prohibit non-nude performances as the one in *J.L. Spoons*. Rather, the express definition of "nudity" contains no reference to any action that may simulate nudity or other non-nude action. Thus, the instant case is distinguishable from *J.L. Spoons*.

Accordingly, after applying the above-referenced, well-established principles of an overbreadth challenge to a local ordinance under the First Amendment, the Michigan Court of Appeals properly concluded that the respondent's ordnance passed constitutional muster. As a result, this issue is not one appropriate for this Court's consideration.

This Court has identified two reasons why a statute can be impermissibly vague: "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), citing *Chicago v. Morales*, 527 U.S. 41, 56-57, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). The ordinance is not vague if "it is clear what the ordinance as a whole prohibits." *Hill v. Colorado*, 530 U.S. at 733. Moreover, similar to an overbreadth challenge, speculation about possible vagueness

in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid "in the vast majority of its intended applications." *Id.*, citing *United States v. Raines*, 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Here, petitioner's only challenge to the ordinance based on the vagueness doctrine is that there is no "precision in draftsmanship" because one cannot decipher the words "directly or indirectly" in the definition of "nudity." This challenge, however, ignores a fundamental rule in a vagueness determination, that precision is not a requirement, as "we can never expect mathematical certainty from our language," *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). As long as it is clear, as a whole, what the ordinance prohibits, the ordinance is not invalid on a vagueness basis. *Id.* As the Michigan Court of Appeals properly reasoned, the instant ordinance plainly puts persons of ordinary intelligence that nudity, which the ordinance clearly defines, is not allowed in Michigan Liquor Control Commission licensed establishments.

Accordingly, after applying the above-referenced, well-established principles of a vagueness challenge to a local ordinance under the First Amendment, the Michigan Court of Appeals properly concluded that the respondent's ordnance passed constitutional muster. As a result, just as with the overbreadth issue, this issue is not one appropriate for this Court's consideration.

III. Injunctive Relief To Ensure Enforcement Of An Ordinance Banning Nudity In Places Where Liquor Is Sold Does Not Amount To Prior Restraint.

The term "prior restraint" describes administrative and judicial orders that block expressive activity before it can occur. *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771, 125 L. Ed. 2d 441 (1993). Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials. *See Shuttlesworth v. City of Birmingham*,

394 U.S. 147, 151, 89 S. Ct. 935, 939, 22 L. Ed. 2d 162 (1968). In that vein, laws that impose a prior restraint on free speech have been disfavored by the courts as tantamount to censorship and thought control. *See Near v. Minnesota*, 283 U.S. 697, 713, 51 S. Ct. 625, 630, 75 L. Ed. 1357 (1931). But not all injunctions are impermissible. The Supreme Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) undercuts any argument to that effect. In that case, the Supreme Court upheld against a First Amendment challenge certain guidelines adopted to control the volume of amplified music at a New York City amphitheater. Under the guidelines, the city employed a sound technician who would be on hand at all performances to control the volume and mix of amplified sound. The respondents in *Ward* argued that this arrangement empowered the city to screen, distort, or altogether shut off speech in advance of its expression, and as such, should be invalidated as a prior restraint in violation of the First Amendment.

The Supreme Court disagreed, and identified perhaps the most important characteristic that sets apart legitimate government regulations from impermissible prior restraints content-neutrality. The essence of the prior restraint doctrine is censorship—a system in which bureaucrats screen material and remove from it parts that are considered too harmful or offensive for public consumption. The key to *Ward* was that the object of the New York City guidelines was not to police the content of performances at the amphitheater, but to eliminate excessive noise from unregulated amplified sound. *See id.* at 795. In that respect, Van Buren Township's ordinance presents a case almost identical to *Ward*. The function of the ordinance is to prevent nudity in premises licensed for the sale of liquor. The ordinance is content-neutral, regulating only the time, place, and manner in which nudity can take place.

The perfect contrast to *Ward*, further illustrating the importance of content-neutrality to the doctrine of prior restraint, is *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971). Unlike *Ward*, the Court in *Keefe* confronted a government order that discriminated on the basis of content. In that case, a community organization in the Austin neighborhood of Chicago launched a leafletting campaign to stop the "blockbusting" practices of a local real estate broker. The organization contended that the broker "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings, and sell homes to Negroes." *Id.* at 416. The Supreme Court reversed a court order enjoining the organization from distributing pamphlets critical of the broker's business practices. Rejecting arguments that the organization's activities invaded the broker's right to privacy, the Court held that

> under *Near v. Minnesota* . . . the injunction, so far as it imposes a prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of [the content of] previous publications, distribution of literature "of any kind" in a city of 18,000.

Id. at 418-19.

Garter Belt argues that the permanent injunction constitutes a prior restraint. But the authority it relies on in support of this proposition is inapposite. *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980), for example, did not involve an injunction requiring a liquor licensee to comply with a narrowly-drawn ordinance that prohibits nudity on licensed premises. Nor was the injunction in *Vance* capable of enforcement without the exercise of extensive government discretion. Instead, the injunction struck

down in *Vance* was issued as a matter of state law to prohibit the exhibition of motion pictures that had not yet been ruled obscene. The state procedural rules governing injunctions, when coupled with the public nuisance statute, allowed state judges to issue injunctions on the basis of a showing that obscene films had been exhibited in the past. The court prohibited injunctive relief of this kind because it would allow prior restraint of speech without any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures without regard to the context in which they are shown.

Unlike in *Vance*, the injunction at issue here merely provides an extra enforcement tool to prevent violation of regulated conduct. The ordinance prohibits nudity, as specifically defined, on premises licensed for the sale of liquor. The ordinance has already been determined to be a permissible regulation; and not a violation of the First Amendment. The precise conduct (nudity as defined in the ordinance on licensed premises) has already been determined to be unprotected. As a result, the ordinance does not amount to a prior restraint of protected speech. Nor is there a possibility that, as with a future motion picture, some doubt as to what conduct falls within the ordinance will lead to protected conduct being enjoined.

The lack of content-neutrality is not the only feature that identifies a system of prior restraint. A content-neutral regulation that "[places] unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 2144, 100 L. Ed. 2d 771 (1988). In other words, when a regulation fails to place appropriate limits on the discretion of public officials to administer the law in a manner that is abusive of speech, the result should be no different than if the law had brazenly set out to discriminate on the basis of content. At stake is the risk that in the absence of "narrowly drawn, reasonable and definite standards for the officials to follow," the law invites

opportunities for the unconstitutional suppression of speech. *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267 (1951); *Kunz v. New York*, 340 U.S. 290, 295, 71 S. Ct. 312, 315, 95 L. Ed. 280 (1951).

This case does not present such a risk. Unlike other laws the courts have struck down as prior restraints, the permanent injunction does not leave open important questions of enforcement to official discretion. *See Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (law that prohibited discussion of religious matters in public places was held unconstitutional where what constituted religion was left to official discretion). In fact, in at least one case involving the regulation of amplified sound, the Supreme Court has expressed a preference for content-neutral and narrowly-drawn standards of the exact type at work in the Westerville ordinance. In *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948), the Court held unconstitutional a New York City ordinance that prohibited the use of sound-amplifying equipment in public places without the permission of the chief of police. Much like *Cantwell*, the key factor in *Saia* was that the law, although content-neutral, prescribed no standards for the exercise of official discretion. The Court stated that the "statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they may be adjusted." *Id.* at 560. It went on to conclude that "noise can be regulated by regulating decibels." *Id.* at 562.

The issue raised here is unlike that presented in *Tory v. Cochran*, a case in which the petition was granted on September 28, 2004. The question presented there was "whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment." *Tory v. Cochran*, Supreme Court No. 03-1488. In *Tory*, well-known attorney, Johnnie Cochran, Jr., sued his former client for defamation and invasion of privacy after Tory and others began picketing Cochran outside of his

office and outside the state supreme court carrying placards calling him a liar and making other statements. *Cochran v. Tory*, 2003 Cal. App. LEXIS 10227 (2003), *cert. granted*, 159 L. Ed. 2d 856 (2004). Typical of the statements were these: "Hey, Johnnie how much did they $$you to f—me?" and "Johnnie Cochran, I know what you, the County, and the City did to my case" and "Johnnie is a crook, a liar, and a thief." A California intermediate appellate court held that this was sufficient for liability under state law because it was a false statement reasonably calculated to induce the reader to understand that a person is guilty of a crime or is dishonest in his profession.

The appellate court upheld a remedy that included a permanent injunction precluding Tory from continuing his unlawful conduct. The court did so despite Tory's argument that the injunction was overbroad since it prohibited him or those associated with him from "(i) picketing Cochran [or] Cochran's law firm; (ii) displaying signs, placards, or other written or printed material about Cochran [or] Cochran's law firm; (iii) orally uttering statements about Cochran [or] Cochran's law firm. . . ." 2003 Cal. App. Unpublished LEXIS 10227, *5.

Although both appellate courts upheld injunctions prohibiting future unlawful conduct, the injunction in this case was not based on a common law cause of action that would require a substantial amount of discretion in line-drawing between permissible and impermissible conduct. Nor did it involve an absolute prohibition on the protected conduct. Here, the protected conduct as raised by Garter Belt is nude, expressive dancing. Nothing in the injunction restrains such dancing per se. Instead, the injunction merely recognizes the validity of the Township's ordinance prohibiting such conduct on liquor-licensed premises. The injunction here does not potentially reach protected conduct. Unlike in *Tory*, where all comments about Cochran have been restrained even though some statements that Tory might make about him would be protected by the First Amendment, the injunction here carefully restrains only future

violations of a narrowly-drawn ordinance that does not reach protected conduct. Thus, the petition should be denied.

The permanent injunction does not grant unfettered discretion to government officials. Nor does it reach protected conduct. To the extent that the injunction merely restrains future violations of the Township's valid ordinance, which bars nudity on premises licensed for the sale of liquor, it does not burden the content of protected speech, or permit unfettered official discretion. The Van Buren Township ordinance leaves entirely untouched the ability of nude dancers to perform; it merely prevents nudity of all types in premises licensed for the sale of liquor. The chief concern which animates the doctrine of prior restraint—the fear of censorship—is not raised by the ordinance's content-neutral regulation of nudity on premises licensed for the sale of liquor. Thus, it is consistent with this Court's precedent and the writ should be denied.

CONCLUSION

Wherefore, Respondent respectfully requests that this Court deny The Garter Belt, Inc.'s petition for writ of certiorari.

Respectfully submitted,

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No. 04-426

IN THE
SUPREME COURT OF THE UNITED STATES

THE GARTER BELT, INC., a
Michigan corporation, d/b/a Legg's Lounge

Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN APPLYING RATIONAL BASIS SCRUTINY TO DETERMINE THE CONSTITUTIONALITY OF RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) DESIGNED TO RESTRAIN EXPRESSIVE DANCE OR SPEECH?**

II. **WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN DETERMINING THAT RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) WAS NOT UNCONSTITUTIONALLY INVALID FOR OVERBREADTH AND VAGUENESS AND REQUIRED UNACCEPTABLE GOVERNMENTAL INVOLVEMENT?**

III. **WHETHER THE MICHIGAN APPELLATE COURT'S AFFIRMATION OF THE TRIAL COURT'S PERMANENT INJUNCTION CONSTITUTED PRIOR RESTRAINT, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?**

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

INTRODUCTION..... 1

REQUEST THAT RESPONDENT'S BRIEF BE STRUCK IN WHOLE OR IN PART AND RESPONDENT'S REQUEST TO LODGE DOCUMENTS WITH THE CLERK'S OFFICE BE DENIED..... 1

I. WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN APPLYING RATIONAL BASIS SCRUTINY TO DETERMINE THE CONSTITUTIONALITY OF RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) DESIGNED TO RESTRAIN EXPRESSIVE DANCE OR SPEECH?..... 4

II. WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN DETERMINING THAT RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) WAS NOT UNCONSTITUTIONALLY INVALID FOR OVERBREADTH AND VAGUENESS AND REQUIRED UNACCEPTABLE GOVERNMENTAL INVOLVEMENT?..... 9

III. WHETHER THE MICHIGAN APPELLATE COURT'S AFFIRMATION OF THE TRIAL COURT'S PERMANENT INJUNCTION CONSTITUTED PRIOR RESTRAINT, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?..... 10

TABLE OF AUTHORITIES

CASE LAW:

44 Liquormart, Inc. v. Rhode Island
517 U.S. 484, 115 S.Ct. 1495, 124 L.Ed. 2d 711
(1996) 7

Bachellar v. Maryland,
397 U.S. 564, 566 (1970) 4

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 6, 8

Ben's Bar Inc v. Vill. of Somerset,
316 F. 3d 702, 707 (7th Cir. 2003) 5, 6

Bronco Entertainment, Ltd, et al v. Charter Township of Van Buren, et al, 99-70197, United States District Court for the Eastern District of Michigan 1

California v. LaRue,
409 U.S. 109 (1972) 7

California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.,
445 U.S. 97, 112-114 (1980) 7

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691, 712 (1984) 7

City of Erie v. Pap's A.M.,
529 U.S. 277, 120 S. Ct. 1382,
191 L.Ed. 2d 265 (2000) 6, 9, 10

City of Los Angeles v. Alameda Books, Inc.
535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed. 2d 670 5, 6

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41, 47 (1986) 5, 6, 8, 9

Cox v. Louisana,
379 U.S. 536, 545 n. 8 (1965) 4

Craig v. Boren,
429 U.S. 190, 209 (1976) 8

Dora v. Lesinski,
351 Mich 579; 88 NW 2d 592 (1958) 4

Hill v. Colorado,
530 U.S. 730 (2000) 10

J.L. Spoons v. O'Connor,
194 F.R.D. 589 (ND Ohio 2000) 9

Joelner, Fish v. Village of Washington Park,
378 F. 3d 613 (7th Cir. 2004) 5

Jott, Inc. v. Charter Township of Clinton,
224 Mich App 513 (1997) 10

Kent County Aeronautics Bd v. Dept of State Police, 239 Mich App 563, 609 NW 2d 593 (2000). 4

Larkin v. Grendel's Den, Inc.,
459 U.S. 116, 122, n. 5 (1982) 7

Meat Cutters v. Jewel Tea
381 U.S. 676 (1965) 4

Promotions, Ltd v. Conrad,
420 U.S. 546, 553 (1973) 10

R.A.V. v. City of St. Paul,
505 U.S. 377, 382 (1992) 5

Stromberg v. California,
283 U.S. 359, 368-69 (1931) 5

Schultz v. City of Cumberland,
228 F. 3d 831, 845 (7th Cir. 2000) 5, 7, 10

Simon & Schuster, Inc. v Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 7

Tennessee Coal Co v. Muscoda Local
321 U.S. 590 (1944) 4

Young v.Am. Mini Theatres, Inc.
475 U.S. 41 (1986) 6

United States v. O'Brien
391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 6

CONSTITUTIONAL PROVISIONS:

UNITED STATES CONSTITUTION
FIRST AMENDMENT 5, 6, 7, 8

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT 10

INTRODUCTION

REQUEST THAT RESPONDENT'S BRIEF BE STRUCK IN WHOLE OR IN PART AND RESPONDENT'S REQUEST TO LODGE DOCUMENTS WITH THE CLERK'S OFFICE BE DENIED

On October 27 and 28, 2004, before filing its Brief in Opposition, Respondent filed with this Court two letters asking that certain documents be "lodged with the clerk's office" in connection with this case. (App 1a-3a). The documents were purportedly "certified copies of Michigan state court criminal records relating to crimes that have occurred on the premises of Garter Belt, Inc., d/b/a Legg's Lounge." In addition, Respondent included copies "of several planning studies filed in related state court litigation." On October 29, 2004, Respondent filed its Brief in Opposition referencing these documents. The proposed documents were never part of the state court record, were never admitted into evidence in any state court proceeding regarding this litigation and were never presented to or considered by Respondent's Board of Trustees when considering adoption of the instant ordinance.

The "several planning studies", submitted by Respondent, relate to Bronco Entertainment, Ltd, et al v. Charter Township of Van Buren, et al, 99-70197, United States District Court for the Eastern District of Michigan regarding Respondent's approval procedures for "adult" businesses and the zoning ordinances related thereto.[1]

In the Bronco litigation, Gary Wilson, an employee of McKenna Associates, Inc., was deposed. Documents marked "Exhibit 10" and "Exhibit 11" are letters of solicitation to

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1. Bronco Entertainment Ltd. was dismissed by the District Court appealed to the Sixth Circuit and remanded by the Sixth Circuit in an unpublished opinion (App 7a)

Michigan townships and cities. Document "Exhibit 17" is a synopsis of federal and state case law and secondary effects studies with primary emphasis on recommendations as to how Respondent can change its zoning requirements so as to eliminate or restrict new sexually oriented businesses. It is silent as to the intended recipient. All three documents are hearsay and none of the documents were reviewed or considered by Respondent's Board of Trustees when considering adoption of the instant ordinance.

Cindy King, a member of the Board of Trustees, Township Supervisor and former Clerk (App 16a-81a), testified that no studies of any kind were reviewed by the Board in connection with the adoption of the ordinance in question. She testified that no one provided information to the Board of Trustees relative to the adoption of the ordinance in question. She stated that there were no discussions as to how requiring a fully opaque covering of the female breasts would affect crime in Van Buren Township. She stated that she knew of no complaints regarding Petitioner's business or the fact that it engaged in adult entertainment. Ms. King testified that the only discussion was updating the master plan "to account for new growth within the community." and that the adoption of the sexually oriented business ordinances, which includes the ordinance in question, was "essentially a ministerial function of updating the ordinances." (App 73a-75a)

Joanie Payne is Clerk of Respondent Township and prior to election as Clerk was Deputy Clerk. Other than knowledge as to the nature of Petitioner's business, she was unaware of the Board of Trustees discussing Petitioner's business. She stated that she personally was unaffected by Petitioner's business and was unaware of any person in the community that had any specific problems with Petitioner's business. She heard no one approach the Board about Petitioner in a public forum and complain about crime or diminishing property values. (App 82a) She testified that she is unaware of "any studies on the effect of adult entertainment within the Township" (App 125a) or studies

regarding property values.

Respondent, in its brief, on page 13, writes as follows:

> The Township thoroughly investigated the adverse secondary effects of nudity on liquor-licensed premises before adopting its ordinance. It examined several reports and memoranda from its planner, McKenna Associates, Inc.

This statement is untrue as per the only testimony offered in evidence by any member of Respondent's Board of Trustees.

On page 14 of its Brief in Opposition, Respondent wrote:

> This history of adverse secondary effects from the existence of a topless bar in which nudity is allowed, in part, prompted the Township to adopt its ordinance. Thus, this argument provides no basis for granting the petition.

As per Ms. King and Ms. Payne, this statement is untrue.

In a footnote to this paragraph, Respondent wrote:

> In addition respondent is prepared to lodge with the clerk's office, official court records demonstrating convictions for illicit activities in the very premises at issue here. Thus, as to these premises, the Township can, not only rely on secondary effects as studied by other jurisdictions, but as evidenced by a series of criminal convictions for conduct on the premises. In addition, respondent has requested to lodge with the clerk's office three studies from the township's planner that demonstrate adverse secondary effects.

The criminal offenses relate to convictions in 2004, almost a year after the Court of Appeals had rendered its written opinion and nearly 5 years after the ordinance had been adopted. Except to potentially prejudice this Court, the criminal convictions are irrelevant and obviously were not a consideration when Respondent adopted the ordinance in question.

Under Michigan law, appellate review is limited to the record developed in the trial court. Kent County Aeronautics Bd v. Dept of State Police, 239 Mich App 563, 609 NW 2d 593 (2000). Exhibits not offered to the trial court are not part of the record on appeal. Dora v. Lesinski, 351 Mich 579; 88 NW 2d 592 (1958). Accordingly, the documents are not part of the Michigan Appellate record. If certiorari is granted, review by this Court is limited to the record presented in the state courts. Meat Cutters v. Jewel Tea, 381 U.S. 676, 694 (1965). Also see Tennessee Coal v. Muscoda Local, 321 U.S. 590 (1944).

In Bachellar v. Maryland, 397 U.S. 564, 566 (1970), this Court, citing Cox v. Louisana, 379 U.S. 536, 545 n. 8 (1965), stated that where Petitioners argued that their conduct was constitutionally protected, "we have examined the record for ourselves. When a 'claim of constitutionally protected right is involved, it remains our duty *** to make an independent examination of the whole record.'" This does not include hearsay never offered.

Respondent's attempt to misrepresent the record below and to offer documents from other litigation was intentional and Petitioner asks this Court to strike Respondent's Brief, in part or in whole, return the documents and grant such other relief as the Court deems proper.

I. WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN APPLYING RATIONAL BASIS SCRUTINY TO DETERMINE THE CONSTITUTIONALITY OF RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) DESIGNED TO RESTRAIN EXPRESSIVE DANCE OR SPEECH?

Respondent, in its Brief in Opposition, writes that Ordinance § 6-69 is:

> a content neutral regulation since it prohibits nudity on all licensed premises. As such, any constitutional challenges leveled at the

> Township's ordinance are properly considered under the relaxed rational basis standard. Analysis should also take into account a state's right to regulate liquor.

Respondent cites no authority for this statement because it is contrary to existing federal law.

In a recent decision by the 7th Circuit, Joelner Fish v. Village of Washington Park, 378 F. 3d 613 (7th Cir 2004), the court wrote:

> Regulations which directly circumscribe a certain category of speech are subject to strict scrutiny and are likely to be constitutionally impermissible. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); [City of] Renton [v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)], 475 U.S. at 47; Stromberg v. California, 283 U.S. 359, 368-69 (1931). But the First Amendment tolerates governmental interference with general categories of expressive conduct, as opposed to actual speech. Schultz [v. City of Cumberland, 228 F. 3d 831, 845 (7th Cir. 2000)], 228 F. 3d at 841. Very generally, whether conduct regulations will be subject to intermediate or strict scrutiny most often actually hinges upon the regulation's intended purpose, rather than some strained interpretation of content-neutrality. See Ben's Bar [Inc v. Vill. of Somerset, 316 F. 3d 702, 707 (7th Cir. 2003)] 316 F. 3d at 723; Schultz, 228 F. 3d at 845 ("[C]ourts often called [regulations] content-neutral without explaining that [they] are in fact content-based and only analyzed as content-neutral when certain preconditions are met.")
>
> There are two distinct, yet overlapping, lines of Supreme Court jurisprudence addressing the degree of First Amendment protection afforded

to adult entertainment, a particular type of expressive conduct. Ben's Bar, 316 F. 3d at 712-13. One group of cases addresses public indecency regulations. See Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Erie v. Pap's A.M. 529 U.S. 277 (2000). The other considers adult entertainment zoning ordinances. See Young v.Am. Mini Theatres, Inc. 475 U.S. 41 (1986); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002). However, the analytical framework underpinning both strains of jurisprudence is rooted in United States v. O'Brien, 391 U.S. 367, 376-87 (1968). Ben's Bar, 316 F. 3d at 714. Consequently, the Supreme Court has held that the distinctions between the test used to assess the constitutionality of public indecency statutes...and that used to evaluate adult entertainment zoning ordinances...are irrelevant.

* * *

A restriction placed upon the number of adult entertainment outlets is constitutional if:
(1) the State is regulating pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments; and (4) the regulation is designed to serve a substantial government interest, [is] narrowly tailored, and reasonable alternative avenues of communication remain available....
Id. at 722 (citations omitted). Step four encapsulates the intermediate standard of scrutiny applicable in First Amendment challenges to adult entertainment regulations, See, e.g., Renton, 475

> U.S. at 47; AMT, 427 U.S. at 61. However, if a regulation fails to satisfy either steps two or three, strict scrutiny applies and, in order to be constitutional, the statute must be "necessary to serve a compelling state interest and be narrowly drawn to achieve that end." Schultz, 228 F. 3d at 848 (citing Simon & Schuster, Inc. v Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

This Court and every Circuit has held the standard of review is either strict scrutiny or intermediate scrutiny. The Michigan Court of Appeals in direct conflict with the decisions of this Court, adopted the lesser standard of rational basis.

Respondent argues that analysis of this ordinance is controlled by California v. LaRue, 409 U.S. 109 (1972) and the Twenty-first Amendment. In 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 464, 516 (1996), Justice Stevens, writing for the majority, stated:

> without questioning the holding in LaRue, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment. As we explained in a case decided more than a decade after LaRue, although the Twenty-first amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the States to ignore their obligations under other provisions of the constitution." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984). That general conclusion reflects our specific holdings that the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause, ibid; California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97, 112-114 (1980), the Establishment clause, Larkin v. Grendel's

> Den, Inc., 459 U.S. 116, 122, n. 5 (1982), or the Equal Protection Clause, Craig v. Boren, 429 U.S. 190, 209 (1976). We see no reason why the First Amendment should not also be included in that list. Accordingly, we now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment.

The Michigan Court of Appeals and Respondent reject Justice Stevens' reasoning and conclude that the Twenty-first Amendment gives Respondent authority to diminish the protections of the First Amendment.

As stated in the Introduction, Respondent claims, now for the first time, that it "thoroughly investigated adverse secondary effects." No studies were conducted, no reports issued, no studies of other communities considered. The trial court held that in the absence of such evidence, Respondent's Board of Trustees could use "common sense" and the Michigan Court of Appeals agreed.

In City of Los Angeles, supra, Justice O'Connor wrote as follows:

> In Renton, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S. at 51-52; see also, e.g., Barnes v. Glen Theatre, Inc., 502 U.S. 560, 584 (1991) (Souter, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). **This is not to say that**

> **a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.** If plaintiffs fail to case direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, e.g., Pap's A.M., supra. (Emphasis added.)

In this case, Respondent had no evidence to support adoption of the ordinance.

In this case, under the ordinance as written, government entanglement is extensive. The "pastie" must cover "one-half of the area of the breast" including the nipple. This requires law enforcement officers to carry tape measures. Dancers are prohibited from wearing "Daisy Mae" shorts that are permissible to be worn on public streets.

II. WHETHER THE MICHIGAN APPELLATE COURTS ERRED IN DETERMINING THAT RESPONDENT TOWNSHIP'S ORDINANCE 02-16-99(2) WAS NOT UNCONSTITUTIONALLY INVALID FOR OVERBREADTH AND VAGUENESS AND REQUIRED UNACCEPTABLE GOVERNMENTAL INVOLVEMENT?

The ordinance in question is close to, if not a total ban, on semi-nude dancing, by male or female. Contrary to Respondent's assertion that the "instant ordinance cannot be read so broadly as to permit non-nude performances as the one in J.L. Spoons [v. O'Connor, 194 F.R.D. 589 (ND Ohio 2000)]", because the ordinance does not distinguish between male and female breasts,

a dinner club with liquor license would be prohibited from performing Lil' Abner because the men are shirtless.

The Michigan Court of Appeals, in its decision, stated that it was bound by its decision in Jott, Inc. v. Charter Township of Clinton, 224 Mich App 513 (1997). However, the Michigan Court of Appeals did not address, in Jott, the unfettered discretion to arrest to law enforcement officers and does not address the "de minimis" clothing limitation set forth in Pap's. The ordinance is overly broad and vague.

III. WHETHER THE MICHIGAN APPELLATE COURT'S AFFIRMATION OF THE TRIAL COURT'S PERMANENT INJUNCTION CONSTITUTED PRIOR RESTRAINT, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

In Hill v. Colorado, 530 U.S. 730 (2000), this Court stated that "prior restraint" concerns relate to restrictions imposed by official censorship. Official censorship is at issue in this case. The ordinance in question enables Respondent, contrary to Promotions, Ltd v. Conrad, 420 U.S. 546, 553 (1973), "the power to deny the use of a forum in advance of actual expression." Respondent argues that even as to prior restraint, the appropriate standard is rational basis instead of strict scrutiny, as set forth in Schultz, supra.

The Michigan Court of Appeals, and by denial of leave, the Michigan Supreme Court, found semi-nude dancing to be obscene. Therefore, prior restraint was not an issue.

Respondent did not use "shoddy reasoning", it used no reasoning. The trial court, in the absence of evidence, adopted a "common sense test", which the Michigan Appellate Courts affirmed.

Dated: 11/8/04

Michael L. Donaldson
Attorney for Petitioner

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October 27, 2004

Mr. William K. Suter, Esq.
Chief Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Garter Belt, Inc. v. Charter Township of Van Buren
Docket No. 04-426

Dear Mr. Suter:

Enclosed are certified copies of Michigan state court criminal records relating to crimes that have occurred on the premises of Garter Belt, Inc., d/b/a Leggs Lounge. Also enclosed is a copy of several planning studies filed in related state court litigation.

They are lodged with the clerk's office in connection with the pending petition for a writ of certiorari filed by Garter Belt, Inc., v. Charter Township of Van Buren, Docket No. 04-426.

Thank you for your assistance in this matter.

Sincerely,

Sincerely,

Maura Massaro Ross

Mary Massaron Ross
Direct Dial (313) 983-4801
E-mail: mmassaron@plunkettcooney.com

MMR/cw
Enclosures
cc: Michael L. Donaldson, Esq.
Patrick McCauley, Esq.

PLUNKETT
COONEY

October 28, 2004

Mr. William K. Suter, Esq.
Chief Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Garter Belt Inc. v. Charter Township of Van Buren
Docket No. 04-426

Dear Mr. Suter:

Respondent Van Buren Township requests consent to lodge various materials with the clerk's office in connection with the pending petition for a writ of certiorari filed by Garter Belt, Inc. v. Charter Township of Van Buren, docket No. 04-426. (We sent earlier correspondence to lodge th documents not realizing the change in procedure. Please allow this letter to substitute for our correspondence of yesterday.)

The materials include certified copies of Michigan state court criminal records relating to crimes that have occurred on the premises of Garter Belt, inc., d/b/a Legg's Lounge. The specific records are:

- Complaint
- Bind Over/Transfer After Preliminary Examination Felony
- Order of Conviction & Sentence (Charles Drayer)
- Order of Probation Misdemeanor (Charles

Drayer)

- Order of conviction & Sentence (John Allen-Lee Tomason)
- Order of Probation Misdemeanor (John Tomason)
- Order of Conviction & Sentence (Roger Thompson)
- Order of Probation Felony (Roger Thompson)
- Order of Conviction & Sentence (Billy Ray Martin)
- Order of Probation Felony (Billy Ray Martin)
- Order of Conviction & Sentence (James Frasure)
- Order of Probation Felony (James Frasure)
- Order of Conviction & Sentence (Bobby Dean Martin)
- Order of Probation Felony (Bobby Dean Martin)
- Order of Conviction & Sentence (Chester Hill)
- Order of Probation Misdemeanor (Chester Hill)
- Order of Conviction & Sentence (Roger Brown)
- Order of Probation Felony (Roger Brown)

In addition, respondent proposes to lodge with the clerk's office a copy of several planning studies filed in related state court litigation. They include:

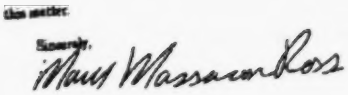
- McKenna Associates, Inc. Report, dated 12/16/98
- McKenna Associates, Inc. Memorandum, dated 1/6/98
- McKenna Associates, Inc. Memorandum, dated 1/20/98

These are matters as to which this Court can take judicial notice because they are part of the official records of state court proceedings. Fed. R. Evid. 201. These non-record materials provide the Court with important background material which

demonstrate that the petition should be denied in this case because the ordinance is a valid police power measure to reduce or eliminate the adverse effects of nudity on these and other liquor-licensed premises.

Thank you for your assistance in this matter.

Sincerely,



Mary Massaron Ross
Direct Dial (313) 983-4801
E-mail: mmassaron@plunkettcooney.com

MMR/cw

cc: Michael L. Donaldson, Esq.
Patrick McCauley, Esq.

IN THE
SUPREME COURT OF THE UNITED STATES

THE GARTER BELT, INC. a Michigan Corportation d/b/a Legg's Lounge,
Petitioner,

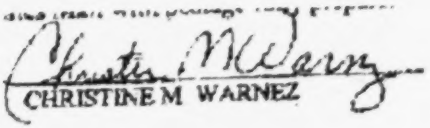
v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan Municipal Corporation,
Respondent.

On the Petition For Writ of Certiorari
To the Court of Appeals of the
State of Michigan

CERTIFICATE OF SERVICE

CHRISTINE M. WARNEZ, says that on October 28, 2004, a copy of the October 28, 2004 letter requesting consent to lodge materials with the U.S. Supreme Court, was served on Michael Donaldson, Attorney for Petitioner, 31564 Schoolcraft Road, Livonia, MI 48150, by depositing same in the United States Mail with postage fully prepaid.



CHRISTINE M. WARNEZ

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

29 Fed. Appx. 310; 2002 U.S. App. LEXIS 2064

February 5, 2002, Filed

BRONCO'S ENTERTAINMENT, LTD., a Michigan Corporation, and RAWSONVILLE LAND CO., INC., a Michigan Corporation, Plaintiffs-Appellants,

v. **No. 00-2181**

CHARTER TOWNSHIP OF VAN BUREN, a Michigan Local Unit of Government, the MICHIGAN LIQUOR CONTROL COMMISSION, a State Agency, and the Commission's Chairwoman, JACQUELYN STEWART, Defendants-Appellees.

NOTICE: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. 99-70197. O'Meara. 09-06-00.

DISPOSITION: Order of dismissal REVERSED, and case REMANDED to district court for further proceedings not inconsistent with this opinion.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, who planned to open a topless bar, brought a civil rights action against defendant township and the Michigan Liquor Control Commission, for blocking the project in alleged violation of the First and Fourteenth Amendments. Concluding that plaintiffs lacked standing to sue, the United States District Court for the Eastern District of Michigan dismissed the case. Plaintiffs appealed.

OVERVIEW: On review, the court noted that the question of plaintiffs' standing had three aspects: standing to challenge the township's licensing ordinance, standing to challenge the township's zoning ordinance, and standing to challenge the commission's refusal to transfer the liquor license. Plaintiffs claimed that the licensing ordinance vested unbridled discretion in a government official. And although plaintiffs did not presently own a topless bar within the township, no one disputes their intention to open one; indeed, they had expended considerable sums to retain the option to purchase land in the township for that purpose. As plaintiffs were subject to the licensing requirements, they had standing to challenge the ordinance. The court held that, by the same token, plaintiffs had standing to challenge the zoning ordinance. Lastly, the court held that they had standing to sue the commission. The commission had admittedly postponed its approval of the liquor license transfer, and this postponement constituted an "injury in fact."

OUTCOME: The order of dismissal was reversed, and the case was remanded to the district court.

LexisNexis(R) Headnotes

Civil Procedure > ***Justiciability*** > ***Standing***
[HN1] To demonstrate standing to sue in federal court, under

Article III of the Constitution, a plaintiff must demonstrate that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Civil Procedure > Justiciability > Standing
[HN2] If the plaintiff does not have standing to sue, a federal court has no jurisdiction to hear the plaintiff's case.

Civil Procedure > Justiciability > Standing
[HN3] Standing is not dispensed in gross.

Civil Procedure > Justiciability > Standing
[HN4] When a licensing statute allegedly vests unbridled discretion in a government official, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.

Civil Procedure > Justiciability > Standing
[HN5] Owners of an interest in property on which they intend to open a topless bar have standing to challenge zoning restrictions to which the property is subject.

COUNSEL: For BRONCO'S ENTERTAINMENT, LIMITED, RAWSONVILLE LAND COMPANY, INCORPORATED, Plaintiffs - Appellants: Robert D. Horvath, Troy, MI.

For TOWNSHIP OF VAN BUREN, Defendant - Appellee: Patrick B. McCauley, Patrick J. Burkett, David J. Szymanski, Carl B. Downing, Sommers, Schwartz, Silver & Schwartz, Southfield, MI.

For MICHIGAN LIQUOR CONTROL COMMISSION,

Defendant - Appellee: Jerold Courtney Smith, Department of Attorney General, Farmington, MI.

For MICHIGAN LIQUOR CONTROL COMMISSION, JACQUELYN STEWART, Defendants - Appellees: Linda P. McDowell, Department of Attorney General, Farmington, MI.

JUDGES: Before: [**2] JONES, NELSON, and DAUGHTREY, Circuit Judges.

OPINIONBY: DAVID A. NELSON

OPINION: [*311]

DAVID A. NELSON, Circuit Judge. The plaintiffs, who plan to open a topless bar in the Charter Township of Van Buren, Michigan, brought the instant civil rights action against the township and the Michigan Liquor Control Commission for blocking the project in alleged violation of the First and Fourteenth Amendments. Concluding that the plaintiffs lacked standing to sue, the district court dismissed the case for "lack of justiciability and want of a legally cognizable case or controversy." This was error, in our view. The dismissal will be reversed, and the case will be remanded for further proceedings.

I

In August of 1998 the sole shareholder of the plaintiff corporations, Richard Skinner, obtained an option to purchase a parcel of land that fronts on a service road for Interstate 94 in Van Buren Township, Michigan. The land was zoned for commercial use. Mr. Skinner's purpose in taking the option was to obtain a site for the operation of a bar staffed by partially nude females -- a type of business in which Skinner was already engaged at several other locations in the Detroit area. Mr. Skinner also entered [**3] into a contract to acquire a liquor license, subject to regulatory approval, with a view to selling

alcoholic beverages in the new establishment.

By letter dated October 23, 1998, an attorney for the plaintiffs informed the Van Buren Township Supervisor of Mr. Skinner's plans. The letter also noted the plaintiffs' belief that the township's approval procedures for "adult" businesses violated the First Amendment. n1

n1 An unpublished 1996 Michigan Court of Appeals decision, *BRK, Inc. v. Charter Township of Van Buren*, Nos. 163835, 170704, declared that Van Buren's special use approval procedure for adult entertainment establishments was unconstitutional.

The township replied that on September 1, 1998, it had instituted a 182-day ban on the acceptance of new site plans. The stated purpose of the moratorium was to provide time for revising the township's licensing and zoning ordinances. The plaintiffs were told that the township would not review any site plan for the proposed topless bar until the moratorium [**4] had expired. The township further advised that it intended to review all future submissions under whatever revised ordinances were in place at the end of the 182-day period.

[*312] The plaintiffs insisted on immediate consideration of their plan. An exchange of letters failed to resolve the parties' differences, and in January of 1999 the plaintiffs brought the present lawsuit against the township and the Michigan Liquor Control Commission. (The Commission was joined as a defendant for the reason that its rules precluded transfer of a liquor license until the transferee obtained a green light from the local authorities.)

The township's revised ordinances went into effect on March 11, 1999. The new zoning ordinance, unlike the old one, restricted the operation of sexually oriented businesses to land

zoned for industrial use and did not allow such businesses to be operated in areas zoned for commercial use.

The district court allowed the plaintiffs to file an amended complaint reflecting this and other changes. The redrafted complaint alleged that the township's new licensing ordinance violated the First Amendment by granting too much discretion to local officials. The new zoning ordinance [**5] was alleged to be constitutionally defective because it unduly restricted the potential venues in which the plaintiffs could exercise their protected rights of "speech."

After extensive discovery, and following some minor changes in the township's new ordinances, the district court began conducting an evidentiary hearing on August 8, 2000. The next day, in the midst of the hearing, the court decided to grant a summary judgment motion previously filed by the township. The court made it clear that the lawsuit was being dismissed solely for want of standing on the plaintiffs' part; there was no adjudication of the merits of the dispute. The order of dismissal was entered on September 1, 2000, and a timely appeal followed. Although the parties have addressed the underlying merits in their briefs on appeal, we see no need to opine on issues that have not yet been decided by the district court.

II

[HN1] To demonstrate standing to sue in federal court, under Article III of the Constitution, a plaintiff must demonstrate that

> "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly [**6] traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will

be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).*

[HN2] If the plaintiff does not have standing to sue, a federal court has no jurisdiction to hear the plaintiff's case. *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 715 (6th Cir. 1995).*

The question of the plaintiffs' standing in the case at bar has three aspects: standing to challenge the township's licensing ordinance, standing to challenge the township's zoning ordinance, and standing to challenge the Michigan Liquor Control Commission's refusal to transfer the liquor license. *Cf. Lewis v. Casey, 518 U.S. 343, 358 n. 6, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996)*("Standing [HN3] is not dispensed in gross").

Although a number of Sixth Circuit decisions have recognized standing to challenge the constitutionality of sexually oriented business licensing ordinances on their face -- see, *e.g., Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 888-89 (6th Cir. 2000);* [**7] *East Brooks Books, Inc. v. City* [*313] *of Memphis, 48 F.3d 220, 224 (6th Cir. 1995)* -- the plaintiffs in those cases already owned or operated such a business. Still, [HN4] "when a licensing statute allegedly vests unbridled discretion in a government official . . . one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988).*

The ordinance at issue in *City of Lakewood* prohibited the plaintiff, a newspaper publishing company, from erecting newsracks along the city's streets without first obtaining a permit. *Id. at 753-54.* The publisher was held to have standing to challenge the ordinance in federal court without first seeking

such a permit and without owning any newsracks in Lakewood. *Id. at 754-55.*

The Lakewood ordinance was alleged to "vest[] unbridled discretion in a government official." *Id. at 755.* The plaintiffs in the case at bar claim to be faced with an ordinance that suffers from a similar defect. And although the [**8] plaintiffs do not presently own a topless bar within Van Buren Township, no one disputes their intention to open one; indeed, they have expended considerable sums to retain the option to purchase land in the township for that purpose. (The township conceded at oral argument that the plaintiffs' option to purchase the I-94 service road property is equivalent, for standing purposes, to an absolute ownership interest in the property.) These plaintiffs are no less "subject to" Van Buren's licensing requirements, in our view, than the publisher in *City of Lakewood* was subject to the Lakewood ordinance. Accordingly, we conclude that the plaintiffs have standing to challenge Van Buren's licensing requirements for sexually oriented businesses.

By the same token, we conclude that the plaintiffs have standing to challenge Van Buren's zoning requirements. The Sixth Circuit has permitted similar suits to go forward without questioning the plaintiffs' standing to sue. See *e.g., Christy v. City of Ann Arbor, 824 F.2d 489, 490 (6th Cir. 1987)*(standing apparently unchallenged when plaintiff leased property where she intended to open an adult bookstore); *CLR Corp. v. Henline, 702 F.2d 637, 638 (6th Cir. 1983)* [**9] (no discussion of standing where plaintiff "purchased and remodeled" building with intent to open adult business); *Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 96 (6th Cir. 1981)*(standing unmentioned where owner of movie theater announced intention to show adult films). The present plaintiffs, as [HN5] owners of an interest in property on which they intend to open a topless bar, have standing to challenge the zoning restrictions to which the property is subject.

Finally, the plaintiffs argue that our decision in *G & V*

Lounge v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994), invalidates the Commission's policy of deference to local governments in the issuance of liquor licenses. Although we disagree with that reading of *G & V Lounge*, we conclude that the plaintiffs have standing to sue the Commission. The agency has admittedly postponed its approval of the liquor license transfer, and this postponement constitutes an "injury in fact."

The order of dismissal is **REVERSED**, and the case is **REMANDED** to the district court [**10] for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE GARTER BELT, INC.,
a Michigan corporation
d/b/a LEGG'S LOUNGE,
Plaintiff(s), Case No. OO-CV-60455

vs

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan Municipal corporation,
Defendant(s) .
_____/

Deposition of CINDY KING, taken in the above-entitled matter before Stenograph Reporter, Kelly Forfar, at **46425 Tyler Road, Belleville, Michigan** on **Monday, June 25, 2001,** commencing at about **10:00 A.M.**

APPEARANCES:

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Appearing on behalf of the Defendant(s).

INDEX OF WITNESSES 2

NAME	PAGE
CINDY KING	
Examination by Mr. Rubin	3
Examination by Mr. Szymanski	38

EXHIBITS

PLAINTIFF'S EXHIBIT(S)	PAGE
1	24

(Exhibit not retained by reporter.)

Monday, June 25, 2001

DEPOSITION

(On record at about 10:18 a.m.)

CINDY KING

was called as a witness, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. RUBIN:

Q. Good morning, Ms. King, my name is Allan Rubin, I represent Legg's Lounge in a lawsuit captioned Garter Belt, Inc., d/b/a Legg's Lounge versus the Charter Township of Van

Buren. Today I am going to be asking you some questions

relative to that lawsuit as well as in conjunction with a

lawsuit filed by the Township against The Garter Belt, Inc.

in the Wayne County Circuit Court, which the parties have

agreed that these depositions may be used interchangeably.

If at any time you don't you understand a question

that I ask you, please stop and let me know. I will be happy

to rephrase it. I am not here to try to trick you or confuse

in any way, so if you don't understand a question that I ask

you, just let me know, okay?

A. Okay.

Q. Also you have to answer verbally, no nods of the

head or shakes because she can't take those

down.

A. Okay.

Q. Have you ever given a deposition before?

A. Yes.

Q. So you are generally familiar with all of the other rules and I won't go through them for you.

A. Yes, I think so.

Q. If at any time you want to take a break or you want to speak to your attorney, just stop and let me know, okay?

A. Okay.

Q. Please state your name and spell your last name for the record.

A. Cindy King, K I N G.

Q. Ms. King, what is your position -- strike that. I understand that you are employed by Van Buren Township?

A. Yes.

Q. In what capacity?

A. I am the township supervisor.

Q. How long have you been the township supervisor?

A. Since November 20th, 2000.

Q. Is that an elected or appointed position?

A. Elected.

Q. And how long have you been elected for?

A. Excuse me?

Q. What's your term?

A. 4-year term.

Q. Prior to being township supervisor, it is my understanding that you were employed as the clerk for the township?

A. Yes.

Q. How long did you hold that position?

A. Eight years.

Q. Again, is that elected or appointed?

A. Elected.

Q. And how long was the term?

A. Both terms were four years each.

Q. Okay. So I take it that you were elected for four years and then you were reelected?

A. That's correct.

Q. Prior to being the township clerk, what did you do?

A. I was a deputy clerk for four years before that.

Q. For this township?

A. Yes.

Q. And prior to being the deputy clerk, what did you

do?

A. I was a secretary in the Willow Run school system.

Q. How long did you do that for?

A. About two years.

Q. And prior to that, did you hold employment?

A. Yes, I worked for Coca-Cola.

Q. And what did you do there?

A. I was the plant manager's secretary.

Q. For what plant?

A. The Van Buren distribution center.

Q. And how long did you do that for?

A. About a year and a half.

Q. And did you hold a job before that?

A. Yes, Van Buren Township.

Q. What did you do there?

A. I worked in the police department.

Q. Doing what?

A. The chief's secretary.

Q. For how long?

A. Four years, four years, I believe.

Q. Who was the chief?

A. There were different chiefs during my time there.

Q. Okay.

A. My first one was George Montgomery.

Q. Okay.

A. And then a man named Richard Debs, D E B 5, and

Q. then Leonard Keller.

Q. Okay. Is that all of them?

A. Yes.

Q. What did you do before you worked as a secretary

for the township, I should say for the police department?

A. I spent some time in the clerk's office and the

treasurer's office.

Q. Let me ask you — was this your initial

employment with Van Buren Township, this period of time?

A. Yes, that was my initial employment.

Q. How long were you employed by the

Township during

that initial period of time?

A. Five years.

Q. And were all of them in -- you said four of them

was for the Chief of Police as a secretary --

A. Uh-huh.

Q. — and the other ones you said were in the

clerk's office?

A. And the treasurer's office.

Q. And the treasurer's office. Anywhere else?

A. No.

Q. What year did you first start working for the

Township?

A. 1978.

Q. And prior to 1978, did you hold any employment?

A. Yeah, I worked for a drugstore.

Q. Which drugstore?

A. American Vitamin.

Q. Is that in Van Buren Township?

A. In the city of Belleville.

Q. Okay. And before that?

A. Baby-sitting.

Q. Okay. Am I taking you back to your first job?

A. Yes.

Q. Okay. What year did you graduate high school?

A. 1979.

Q. What high school did you graduate?

A. Belleville High School.

Q. And did you go to college?

A. Yes.

Q. Where did you go to college?

A. I went to Wayne County Community College, Washtenaw Community College, and I pulled my undergraduate from Concordia College in Ann Arbor.

Q. What year did you graduate from Concordia?

A. 1990, I believe.

Q. With a BA?

A. Uh-huh.

Q. In what?

A. Human resource administration.

Q. Did you get any associate's degrees prior to that?

A. Yes, at Washtenaw.

Q. What did you get?

A. Liberal arts.

Q. I take it from your history of where you went to high school and where you have worked, you have been a lifelong resident of this general area?

A. For the most part, yes.

Q. Has that been in Van Buren Township or did you reside in Belleville, or both?

A. Both.

Q. When did you first start residing in Van Buren

Township?

A. When I was born.

Q. So you were born and your parents lived in Van Buren Township?

A. Yes.

Q. When is the first time that you were aware of a business called Legg's Lounge?

A. When was I first aware?

Q. Yes.

A. Probably sometime in the `80s, I am thinking.

Q. Okay. Did you become aware of it while you were working for Van Buren Township?

A. Yes, yes.

Q. And how did you become aware of it? Was it in a professional capacity, for example, working for the chief?

A. Yeah, probably.

Q. Okay. And what is it -- do you recall how you first became aware of it?

A. No.

Q. Okay. Do you know when it opened?

A. No, I don't know the specific date.

Q. Okay. Do you have a general idea?

MR. SZYMANSKI: If you don't know, just tell him you don't know.

THE WITNESS: Yeah, I don't know.

Q. (BY MR. RUBIN): How is it that you first became aware of it; was there an incident or something that sparked your awareness?

A. Probably. I don't know, probably.

Q. Okay. Now where is Legg's Lounge located?

A. On Michigan Avenue.

Q. Between — do you know -- can you give me some

more specifics?

A. Northwest part of the township, south side of Michigan Avenue, west of Belleville Road.

Q. Now, when you first became aware of -- strike that.

When do you first recall having any professional dealings, if at all, with Legg's Lounge?

A. When I worked in the police department.

Q. Okay. And do you recall any of the professional dealings that you may have had over the years?

A. No.

Q. No incident or anything sticks out in your mind?

A. I know there were incidents that occurred there.

Q. Okay. You mean the police runs and things like that?

A. Uh-huh.

Q. Is that a yes?

A. Yes, I am sorry.

Q. Are there police runs and incidents that occur in other locations in Van Buren Township?

A. Yes.

Q. Okay. Now, you were the clerk when the city adopted -- I'm sorry, the township adopted a series of ordinances attempting to regulate adult businesses?

A. Yes.

Q. As clerk did you have to go to city council — I guess township board of supervisor meetings or --

A. Yes.

Q. — or their equivalent?

A. Yes.

Q. Did you go to zoning board hearings?

A. No.

Q. Did you go to planning commission hearings?

A. I have been to planning commission meetings, yes.

Q. Did you ever go to any planning commission

meetings, zoning board of appeals meetings or township

supervisor meetings in your capacity as the township clerk

when these ordinances were being considered for adoption?

A. No.

Q. Who was the clerk who would have gone to those

meetings?

A. I am not sure if I understand your question.

Q. Sure. Well, typically as I understand the

township board of supervisors and how they work, when they

have a meeting there is generally the clerk or somebody from

the clerk's office there, correct?

A. No.

Q. That's not true?

A. Not in Van Buren's case

Q. Okay. Who records minutes and all of those things?

A. We have various employees who serve as recording secretaries through our commissions and committees.

Q. Is there a record --

A. The minutes of any of those meetings should be

signed by a recording secretary.

Q. Okay. Who maintains the materials submitted to those types of hearings?

A. The official minutes are kept in the clerk's office.

Q. Okay. Who maintains -- strike that. For example, if materials submitted as exhibits and things like that, how are those handled in the clerk's office? Let me see if I can make the question a little bit clearer For example, if somebody were to submit to -- let's use the planning commission or the material in support of an adoption of an ordinance, would those materials typically be maintained?

A. They would likely be maintained, but perhaps not in the clerk's office.

Q. Where would they be maintained?

A. They may be maintained in the department of developmental services.

Q. Okay. Is there somebody who is responsible for ensuring the accuracy and completeness of those records and

files?

A. Yes, the director of the department.

Q. And who would that have been back in — at the time of the adoption of these ordinances?

A. That would have been Bryce Kelly.

Q. My understanding is that Mr. Kelly is no longer employed by Van Buren Township?

A. That's correct.

Q. Did he retire — do you know the circumstances of him leaving?

A Yes.

Q. What are those?

A. He resigned to take another position.

Q. Does the city of Van Buren -- strike that, does the township of Van Buren maintain records of property value?

A. Yes.

Q. How are those records maintained?

A. I am sorry, property value?

Q. Property value records?

A. We maintain property records of ownership.

Q. Okay. Do you have an assessor's office?

A. Yes, we do.

Q. What does the assessor's office do here in the township?

A. Well, we maintain a record of improvements to properties, you know, new construction, renovations, that kind of thing, lists of owners.

Q. Well, one of the things that they do is send out the tax assessments, right?

A. Yes.

Q. And do you know how long those records are

maintained for?

A. No, I do not.

Q. Who would know those— who is the township

assessor?

A. Wayne County does the assessment for Van Buren

Township.

Q. Okay. And where are -- who is in charge of

keeping those records here at the township?

A. Within the assessor's office, Susan Ireland and

Linda Stevenson.

Q. For example, if I wanted to go get records of

various property values, I would go see Susan or -- I am

sorry --

A. Yes, Susan or Linda Stevenson.

Q. And they would be able to provide me with the

record for the various parcels of property?

A. Yes.

Q. Those would be the two people that I would ask

about that, correct?

A. Yes.

Q. If I wanted to find out crime statistics for Van

Buren Township, do you know if those are maintained?

A. Yes, I believe they are.

Q. For example, do you know if you report to the FBI

as part of the Uniform Crime Reporting?

Yes, I believe we do.

Do you know where those records are maintained?

In the public safety department

And who would be in charge of maintaining those

records?

Right now our interim public safety director is Allen Smolen.

MR. SZYMANSKI: Spell first name

THE WITNESS: ALLEN, SM0LEN.

MR. SZYMANSKI: Thanks.

Q. (BY MR. RUBIN) : Now, in what capacity did you attend the various hearings? You said that you attended some hearings, one of the commissions, boards, as it related to adoption of the adult entertainment ordinance?

MR. SZYMANSKI: Let's just clarify, the body we are talking about is the board of trustees

MR. RUBIN: The board of trustees. Would you agree that wherever I say board of supervisor, it is the boards of trustees.

Q. (BY MR. RUBIN): In what capacity did you attend those

I would have attended those as the clerk of the township.

Q. And for what purposes?

A. To vote on those matters that come before the board.

Q. Okay. I take it that you would have -- you would have been a voting member?

A. Yes.

Q. And would have been responsible for casting at least one of the votes in support of the adoption?

A. Yes.

Q. Now, you clarified something for me and I

apologize.

Now, when you were the clerk of the township and voting on these matters, what information was provided to you in support of the adoption of these ordinances?

A. I don't remember what we were given as part of our packet.

Q. Okay. Now, what -- did you meet with anybody to discuss the adoption of these ordinances?

A. Well, I am sure Bryce Kelly was part of those meetings. As the director of the department he would have brought those items for consideration to the board.

Q. Were these ordinances -- am I using the correct term?

A. Yes.

Q. Were these ordinances drafted by somebody from the

township? I mean, for example, were they introduced by a

specific member?

MR. SZYMANSKI: Allan, just let me be clear. You

asked her on the one hand if they were drafted by somebody

and then --

MR. RUBIN: Let me see if I can rephrase it.

Q. (BY MR. RUBIN) : Were these ordinances introduced

by a specific member of the township board of trustees?

A. The items are placed on an agenda by the township

supervisor.

Q. Okay.

A. Bryce Kelly would have given those items to the

supervisor to be placed on the agenda.

Q. Prior to these ordinances being proposed to the board of trustees, do you know -- strike that. Do you know whether the board of trustees instructed anybody to begin adoption of such ordinances?

A. No, I do not recall the board giving that direction.

Q. Okay. In your capacity, did you learn why these ordinances were proposed?

A. Could you repeat that, please.

Q. Sure. In your capacity as a member of the board of trustees, did anybody tell you why they were proposing these ordinances?

MR. SZYMANSKI: She is not. Allan, not to make to

fine of a point on it, she is not a member of the board of

trustees.

THE WITNESS: Yes, I am.

MR.SZYMANSKI: As an elected clerk you are a member of the board of trustees.

THE WITNESS: Yes.

MR. SZYMANSKI: My mistake, I am sorry.

Q. (BY MR. RUBIN): As the elected member of the board of trustees, do you recall how — what circumstances it was that these were placed before the board of trustees for consideration?

A. I am not sure I understand what you mean by what circumstances.

Q. Well, sure, I mean, had there been an incident in the community that sparked an interest in the adoption of these ordinances?

A. No, not a specific incident in the community.

Q. Okay. Were there any specific incidents outside of the community?

A. During that period of time, 1998, 1999, the township was going through many of its ordinances, making revisions, adopting new ordinances, trying to address a considerable amount of growth that was and is continuing to occur in the community.

Q. Uh-huh.

A. Part of a master plan revision -- so in that context that's --

Q. So as near as I understand it, you were updating and revising the township's master plan?

A. Yes, which also included drafting new ordinances

and making revisions to old ones and that kind of thing.

Q. And at some point somebody suggested that you

adopt a series of ordinances dealing with adult

entertainment, correct?

A. I don't know that to be the case.

Q. Okay. Somehow they managed to meet --

A. They came to the board.

Q. They came to the board.

A. Yes.

Q. And as near as I understand it, you don't recall

anybody from the board instructing somebody to --

A. Not that took place in my presence, no.

Q. Okay. And at that time there had been an adult

entertainment facility in town. At least one, for at least

twenty years, correct, or right around that time?

A. Yes, that being Legg's, yes.

Q. Do you know whether anybody ever approached

anybody from Legg's to get their input or to seek their input

on what types of ordinances may be appropriate to adopt for

the --

A. I don't know if anyone did that.

Q. Do you recall anybody from Legg's appearing before

the township board to testify one way or the other?

A. No, I don't recall anybody appearing from Legg's.

Q. Do you know whether anybody invited them to

appear?

A. I don't know.

Q. Are there other bars in town other than Legg's?

A. Yes.

Q. And when I say in town, I mean in the township?

A. Yes.

Q. Approximately how many licensed liquor establishments are there who serve alcohol on the premises?

A. A dozen.

Q. At the time that these -- that these ordinances were being adopted, do you know if anybody ever compared, for example, the need for police services between liquor licensed establishments without — I am sorry, without adult entertainment and those with adult entertainment?

A. I missed the first part. Can you repeat it.

Q. Sure. As a part of adoption for these ordinances,

do you recall anybody who compared the need for police

services between liquor licensed establishments that did

present adult entertainment and those that did?

A. Nothing like that was brought before the board.

Q. Do you know whether or not anybody compared

property values in and around adult entertainment facilities

which -- the adult entertainment facility and those around

other alcohol serving facilities which don't feature adult

entertainment?

A. No, I don't know if anyone did that.

Q. And you don't recall anybody testifying to the

board about that?

A. No.

Q. Did you review any studies in connection with the

adoption of these ordinances from other communities?

A. No.

Q. Did you conduct -- did the board of trustees or

anybody else direct anybody to conduct any studies of the

effects of adult entertainment on the township, for example?

A. Did the board direct?

Q. Yes.

A. No.

Q. Do you know if anybody else did that?

A. No, I don't know.

Q. Did anybody testify or provide information to the

board relative to that?

A. No, I don't think so.

Q. Okay. Did you conduct -- strike that. Do you

recall whether -- strike that. Let me rephrase the

question.

Do you recall anybody testifying or providing information to the board about what were commonly referred to as adverse secondary effects of adult entertainment?

A. Do I remember if anyone --

Q. Did anybody provide information to the board about that?

A. Tell me what you mean by adverse secondary.

Q. Sure. And let me see for purposes of this question if you can use this definition, whether or not it is the right one or not. Bad things from adult entertainment, that adult entertainment in a community causes bad things in or around it as opposed to what would generally be referred

to as primary effects; and that would be the person's

response to watching that kind of entertainment. Do you know

the distinction?

A. I know when those ordinances went to the board we

talked about demands for service.

Q. Okay. Now do you know what information you

received relative to demands for service?

A. I don't recall us getting any written

documentation, I know it was talked about.

Q. Do you recall what was talked about?

A. More calls, you know, police officers being called

out more frequently perhaps than other locations, that kind

of thing.

Q. Do you know what information, underlined, the

police -- whoever testified to about that information?

A. I don't you had.

Q. Sure. Let me ask you a question. You heard Mr.

Szymanski and I talking earlier today about some

information --

A. Uh-huh.

Q. -- and some documents that he given me. And I am

going to show you a packet of materials --

MR. RUBIN: I am going to have it marked, I guess,

just for identification purposes, as one.

(Deposition Exhibit No(s) 1

marked for identification.)

Q. (BY MR. RUBIN) : And these were some documents

that were previously provided to us and identified by Mr.

Perkins as being the information that the police

department

supplied to Mr. Kelly relative to the calls for service,

okay?

A. Okay.

Q. Do you know whether or not the information

contained in those packets were what was talked about? And

you can feel free to take a look at them.

A. These are different copies of police records.

am sorry, your question was?

25

Q. Do you know whether those were the police reports

that were talked about?

A. There were no specific reports or incidences, as I

recall, discussed, it was more in a general sense.

Q. And do you know -- would you agree

with me that

6 it would be important to know whether or not the information

7 that was talked about with the board was accurate?

8 A. Well, of course.

9 Q. For example, if you take a look through -- here,

10 can I see that for a second.

11 A. Uh-huh.

12 MR. SZYMANSKI: While you are looking, I want to

13 place an objection on the record. First of all, I think

14 there is no suggestion and certainly been no testimony that

15 these reports were presented to the board in any form. So, I

16 mean, if you are going to ask her whether or not these

17 reports are somehow in error, it assumes facts not in

18 evidence that they were ever presented to the

board.

MR. RUBIN: Thank you.

Q. (BY MR. RUBIN) : Now, do you remember there being any discussions, for example, of any incidents of indecent exposure?

MR. SZYMANSKI: I am going to object to your answering it until you define the term.

Q. (BY MR. RUBIN): To an individual exposing

themselves to another individual, their genitalia?

MR. SZYMANSKI: Your question is, were incidences of indecent exposure as you just defined it discussed with the board at the time of ordinance adoption ?

MR RUBIN: Yes.

THE WITNESS: Not that I recall.

Q. (BY MR. RUBIN) : Do you recall general incidences such as that being discussed?

A. No.

Q. Okay. Do you recall any general incidents being discussed?

A. I recall it being mentioned that there were -- I am at a loss how to -- calls for service generally.

Q. Okay.

A. Calls for police service.

Q. Okay. And do you know what those calls for police services were compared to?

A. No, I don't.

Q. And when somebody says, for example, they had more calls for service, do you know who they were comparing those

calls to services to?

A. No.

Q. Was that ever discussed?

A. I don't remember.

Q. And the reason I ask you that is -- you know, for

example, a house located at 1126 Main Street may certainly

have less calls for service than a commercial business, would

you agree with that?

A. Perhaps.

Q. May have more, but it would be important to know

what you were comparing, would you agree, when you are

talking about calls for service?

A. Yes.

Q. Okay. And would you agree with me, for

example,

it would also be important to know that you were talking

about the specific business that you were talking about as

opposed to some other business, correct? Let me give you an

example, I want you to assume for a moment Mr. Perkins, who

is I understand the former police chief?

A. The former public safety director.

Q. Former public safety director, testified that they

supplied a packet of information to Bryce Kelly. And in that

packet of information, for at least many of the years was

inaccurate or what appeared to him to be inaccurate

information. For example, calls to a place at Sunset Plaza,

okay?

A. Okay.

Q. Would that have been important to know at the time

that you were discussing the adoption of these ordinances?

MR. SZYMANSKI: Well, again, it assumes facts not

in evidence and I think you have mischaracterized Mr.

Perkin's testimony. His testimony was not that that

information was presented to the board of trustees, he just

characterized it.

MR. RUBIN: Fair enough, your objection is noted.

Q. (BY MR. RUBIN) : You can answer the question.

A. I didn't know that any material had been provided

to Mr. Kelly.

Q. Okay. So it wouldn't have mattered one way or the

other what information was provided to him?

MR. SZYMANSKI: It wouldn't have mattered to whom,

Allan?

MR. RUBIN: To her.

Q. (BY MR. RUBIN) : Let me see if I can back up for a

minute and perhaps I can make my question a little clearer.

Who was discussing calls of service?

A. Director Kelly at the time, he brought that item

to the board for consideration.

Q. Okay.

A. The ordinances.

Q. Okay. And what was Mr. Kelly discussing with the

board relative to calls for service?

A. He discussed the research he had done.

Q. What did he tell you the research he had done was?

25 A. Getting information from the public safety

1 department--

2 Q. Okay.

3 A.--in part.

4 Q. Now, would it have been important to your

5 consideration back then if the information that he was

6 relying upon was -- to know whether or not it was accurate?

7 A. Yes

8 Q. Okay. So, for example, if Mr. Kelly was provided

9 with information which was inaccurate, would that have

10 affected your consideration, perhaps, of these ordinances?

11. A Yes

12. Q. Okay. What else do you recall Mr. Kelly

13 discussing with you relative to the adoption or

the reasons

for adoption of these ordinances?

A. I guess I don't recall anything else.

Q. Now, did anybody discuss with you what types of

problems that you were having, for example, with Legg's

Lounge?

I don't recall him bringing up specific

incidences.

Q. Did anybody discuss with you how these proposed

ordinances would further any -- further the alleviation of

any of the harms that were generally brought to your

attention?

A. Say that one more time.

Q. Sure. For example, do you recall anybody giving

you any information as to how these proposed ordinances might

stop problems in the future?

I don't recall us getting any other written

information, no.

Q. Do you recall any other verbal information?

A. Other than what I said earlier about reducing,

perhaps, calls, you know, the times that the police

department would be called to locations like that.

Q. Okay. Now, do you know whether or not the

proximity -- strike that, the location in which the business

was located itself as opposed to the business may have had

anything to do with the calls for service?

A. Do I know if the location would have had --

Q. Did you guys have any discussions about that?

A. As far as -- I am not sure if I understand your

question.

Q. Sure, let me see if he can rephrase it. I have a

map here of Van Buren Township. And you can ignore coloring

and the circles, but near as I understand it, Legg's Lounge

is located in or about this area where — sort of near area

one?

A. Uh-huh, yes.

Q. Is that a yes?

A. Yes, I am sorry.

Q. And it is located on Michigan Avenue?

A. Yes.

Q. Is Michigan Avenue a small country road?

A. No.

Q. Is it one of the major thoroughfares through the community?

A. It would be one of our major east west, yes.

Q. Okay. Now do you know whether or not its proximity just being on Michigan Avenue had anything to do with the calls for service?

MR. SZYMANSKI: If you know? If you don't know, tell him you don't know.

THE WITNESS: I have an opinion.

MR. SZYMANSKI: He is not asking your opinion.

Q. (BY MR. RUBIN): Do you have an opinion?

A. I would assume being a busier road that --

MR. SZYMANSKI: Don't assume, tell him what you know or don't know.

Q. (BY MR. RUBIN): Well, for example,

how close is

it to the edge of the township?

A. It is fairly close to our northwestern boundary.

Q. So any police runs to that area would generally be

in or around that business, correct, to the northeast

quadrant?

A. Northwest.

Q. I am sorry, northwest quadrant?

A. Say that one more time.

Q. Sure, let me give you an example. Somebody breaks

down on Michigan Avenue and pulls into the parking lot and

calls for the police. Do you know whether or not that those

types of incidences were included in the discussion of the

calls for service?

A. No, I don't know that they were.

Q. Now, as I understand it, there is a big area kind of just behind Legg's Lounge that is taken up by some business, correct?

A. Yes.

Q. Is that the airport?

A. Yes, it is.

And in or about this quadrant, what other types of commercial businesses are located in an area near Legg's Lounge?

A. What other businesses are located up here?

Q. Yes.

A. There is a mobile home park, there is another bar east of Legg's Lounge on Michigan Avenue, and as far as from Van Buren Township, that's about it.

Q. Did you guys undertake or discuss any --

have any

24 discussion about calls for services, for example, to the bar

25 in a similar area of town?

1 A. No, I don't recall us talking about that bar

2 specifically.

3 Q. Did you have any discussions as to how, for

4 example -- having coverings of the dancers inside the bar

5 would affect the calls for service?

6 A. No, we did not talk about that.

7 Q. Was any information provided to you as to how

8 requiring some covering of the dancers inside the bar

9 engaging in dance activities would affect calls for service

10 to the location?

11 A. No.

Q. Did anybody discuss with you how making it a crime

for somebody to have -- for somebody to appear in public

with their male genitals -- and I apologize, I am just

reading from the ordinance, in a -- a turgid state would

affect the crime rate in Van Buren Township?

A. Was that discussed, is that the question?

Q. Yes.

A. No, it was not.

Q. Did anybody discuss how requiring a fully opaque

covering of the female breast covering at least part of the

nipple or areola would affect crime in Van Buren Township or

calls to service in general?

A. No.

Q. Was any information provided to the board relative

to those issues?
A. No.

Q. Did anybody discuss with the board the affect that

licensing of adult entertainment businesses within the

township would have on calls for service, for example, to

adult entertainment venues in the township?

A. Excuse me?

Q. Requiring licensing of adult entertainment vendors

would have on calls for service within the township?

A Did anyone discuss how licensing them? --

Q. Yes.

A. Well, licensing would provide a means for tracking

those uses, it would provide some information to us that we

may not have.

Q. Do you know what information, for example, that

the township was lacking over the ownership of Garter Belt at

the time that it adopted this ordinance?

A. No, I don't know.

Q. Were you aware of who the owner of Legg's Lounge

was at the time that you adopted this ordinance?

A. Yes.

Q. That is John Hamilton, correct?

A. Yes.

Q. It wasn't a secret that he was the owner of this,

was it?

A. No.

Q. Was there a reason that the township sought to

adopt these ordinances --

MR. SZYMANSKI: Asked and answered.

(BY MR. RUBIN) : -- other than the revision of these plans -- I am sorry, the master plan and the going through of the ordinances to change them?

A. I am sorry?

Q. Was there any other reason other than you were going through the plans to change them -- I am sorry, the master plan to update it to account for new growth within the community, and adopting and amending some ordinances, were there any other reasons other than the mere fact that you were doing that, that these ordinances were adopted?

A. No, I guess -- I don't know

Q. I mean, was there any, you know -- was there any -- had there been any complaints, for example,

to the

township that nudity was going on inside the bar?

A. No.

Q. Were there any -- any problems associated with

the bar other than perhaps some more calls for service from

the police?

A. Not that I know of

Q. Was anybody complaining that you were unable to

attract growth because of the presence of the bar in the

township?

A. No.

Q. And I take it, perhaps retracting some of this

growth the township might be wishing right now? I am

teasing.

Was there any complaints that proper values were

being decreased by of the presence of this business?

A. No.

Q. So it was essentially a ministerial function of

updating the ordinances, as near as I can tell, correct?

A. Yes, it is.

Q. Do you know who drafted these ordinances?

A. No, I do not.

Was there any discussion of these ordinances other

than Mr. Kelly making his presentation to the board of

trustees?

A. Do you mean by other people?

Q. Yes.

19 A. No.

20 Q. So nobody else other than Mr. Kelly, I guess,

21 appeared before the board of trustees to discuss the reasons

22 for adoption of these ordinances?

23 A. That's correct.

24 Q. Would there have been any other procedure that

25 would have gone through prior to coming to the board of

1. trustees other than whatever Mr. Kelly may have done?

2 A. They may have gone before a planning commission.

3 Q. Do you know, did the planning commission make any

4 recommendations relative to these ordinances?

5 A. I don't remember.

6 Q. Okay. Who else was on the board of trustees at

the time that these ordinances were adopted?

A. Helen Foster would have been supervisor. Sherry

Budd..

Q. What was Sherry Budd?

A. She was a treasurer.

Q. Can you just give me each person's position as you

give me their names?

A. Sure. The four trustees would have been Donna

Clark, Philip Hart, HART, John Herman and Walter

Rochowiak, that's ROCHOWIAK.

MR. SZYMANSKI: Walter was the first name?

THE WITNESS: Yes.

Q. (BY MR. RUBIN) : Subsequent to the adoption of

these ordinances, other than perhaps -- I understand there

was another lawsuit that was filed against the

township by a

company called Procko Entertainment?

A. Yes.

Q. Other than discussions relating to that lawsuit or

this lawsuit, has any of the issues about these ordinances

come back before the board of trustees other than in the

context of discussion of litigation?

A. No.

Q. Have there been any ongoing complaints relative,

for example, to Legg's Lounge subsequent to the time of the

adoption of these ordinances other than the lawsuit?

A. Not that I am aware of.

Q. And as the township supervisor now, I take it that

you would be the person who would be in the know because, as

l understand it, you are responsible for administering all of

the departments within the city -- within the township?

A. Yes, I am supposed to be in the know. I just

don't know if there's any --

Q. Nothing important enough to bring it to your

attention, fair enough?

A. Correct.

MR. RUBIN: All right. Thank you. I have nothing

further.

MR. SZYMANSKI: I just have one.

EXAMINATION

BY MR. SZYMANSKI:

Q. Do you know McKenna and Associates?

A. Yes.

Q. During the course of the board of trustees's

consideration of the adoption and modification of the ordinances in question here, did representatives from McKenna & Associates make presentations to the board of trustees?

A. Not that I remember.

Q. Are you aware of McKenna and Associates making presentations to the planning commission?

A. I don't remember if they did or not.

MR. SZYMANSKI: Okay. No other questions

MR. RUBIN: Nothing further.

(Whereupon deposition was concluded at about 11:10 a.m.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
SS)
COUNTY OF OAKLAND)

I hereby certify that on the date and at the place hereinbefore set forth, I reported stenographically the proceedings held in the matter hereinbefore set forth, and that the testimony so recorded was subsequently transcribed by me with the use of computer-aided transcription under my direction and supervision, and that the foregoing is a full, true and accurate transcript of my original stenotype notes

DATE: 7.10.01 /S/

Kelly Forfar
(CSR- 3618)
Certified Reporter

Notary Public:
County of Oakland
My Commission Expires
January 1, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE GARTER BELT, INC.,
a Michigan corporation,
d/b/a LEGG'S LOUNGE,
Plaintiff(s), Case No. 00-CV- 6O455
vs

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan Municipal corporation,
Defendant (s) /

Deposition of **JOANNIE PAYNE**, taken in the above-entitled matter before Stenograph Reporter, Kelly Forfar , at **46425 Tyler Road, Belleville, Michigan** on Monday, **June 25, 2001**, commencing at about **11:00 AM.**

APPEARANCES:

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Appearing on behalf of the Defendant(s).

INDEX OF WITNESSES

NAME	PAGE
JOANNE PAYNE	
Examination by Mr. Rubin	3

NO EXHIBITS MARKED

Belleville, Michigan

Monday, June 25, 2001

DEPOSITION

(On record at about 11:26 a.m.)

JOANNIE PAYNE

was called as a witness, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. RUBIN:

Q. Good morning. Could you state your name and spell your last name for the record.

A. Joannie Payne, PAYNE.

Q. Ms. Payne, my name is Allan Rubin, I

represent The

19 Garter Belt, Inc. in a lawsuit captioned The Garter Belt,

20 Inc. versus the Charter Township of Van Buren.

21 Today I am going to be asking you some questions

22 relative to that matter along with another matter captioned

23 the Charter Township of Van Buren versus The Garter Belt,

24 Inc. pending in the Wayne County Circuit Court in which the

25 parties have agreed can be used in either matter.

1 I am going to ask you some questions about that

2 matter. If at any time I ask you a question that you don't

3 understand, please stop me and let me know.

4 A. Okay.

5 Q. I can ask confusing questions and you are

not

going to insult my feelings if you tell me that you can't

understand my question. Because if you answer a question, I

am going to assume two things: One, that you understood the

question and, two, that you are giving the answer that you

intend to, okay?

A. Uh-huh.

Q. The other thing is that you have to answer yes or

no. Nods of the head, shakes, uh-huhs and huh-uhs are very

difficult to be recorded by the court reporter, so please

make sure that you answer those questions verbally and with

yes or nos or whatever answer that you feel you need to give

to a question, okay.

A. Yes.

Q. Ms. Payne, I understand that you are now the township clerk for Van Buren Township?

A. Yes.

Q. I understand that is an elected position?

A. Yes.

Q. I understand that it is a four-year elected position, correct?

A. Yes.

Q. I understand you sit on the board of trustees as a result of that elected position?

A. Yes.

Q. Who else sits on the board of trustees with you presently?

A. Do you want their names?

Q. Names and titles.

A. Cindy King as supervisor, myself as clerk, Sherry

Budd as treasurer. The four trustees are Philip Hart, John

Herman, Jeffrey Jar and Walter Rochowiak.

Q. How do you spell Rochowiak?

A. ROCHOWIAK.

Q. And how long have you been the township clerk?

A. Since November 20th, 2000.

Q. Congratulations.

A. Thank you.

Q. Prior to being the township clerk, did you hold a

position within the township?

A. Yes, I was the deputy clerk.

Q. Is the deputy clerk an elected or appointed

position?

A. Appointed position.

Q. Who appoints that position?

25 A. The township clerk.

1 Q. Okay. For how long did you serve as the deputy

2. clerk?

3 A. Four years.

4 Q. And prior to that, were you employed by the

5 township?

6 A. Yes.

7 Q. And what did you do?

8 A. Accounting.

9 Q. When you say accounting, what do you mean?

10 A. Accounts payable, payroll.

11 Q. I got you. You were doing the accounting

12 functions for the township?

13 A. Right.

14 Do you have a degree in accounting?

A. No.

Q. For how long did you do those accounting type of things?

A. From 1992 to 1996.

Q. Were you employ by the county before that -- I am sorry, the township before that?

A. Yes.

Q. For how long were you employed before that?

A. I have got two tenures here, I was originally employed in 1986 -- no, 19 -- excuse me, 1981 to 1986 and came back in 1990.

Q. Okay. Why don't we do this. Between 1990 and 1996, what did you do, what various jobs did you hold, if any?

A. Account Clerk and assistant bookkeeper.

Q. `81 to `86, what did you do?

A. Clerk typist and account clerk.

Q. Between `86 and `90, were you employed?

A. Yes.

Q. Where were you employed?

A. That was also here, that was part time.

Q. Okay. And what did you do when you were employed

part time for the township?

A. Same types of duties.

Q. So as near as I understand it, from `81 until

present you have been employed in some capacity by the

township of Van Buren?

A. Correct

Q. Was that the first job that you had, was working

for the township Van Buren?

A. No.

Q. First full- time job, I should say?

A. Yes

Q. Prior to that what did you do in 1981?

A. I went to college and worked part time in a clothing store.

Q. Where did you go to college?

A. Eastern Michigan University.

Q. Did you obtain a degree?

A. No.

Q. For how long did you go to school there?

A. Two years.

Q. What was your course of study, if any?

A. General.

Q. Did you ever finish your degree?

A. No.

Q. What year did you graduate high school?

A. 1979.

Q. And from where did you graduate high school?

A. Belleville High School.

Q. Near as I can tell, then, you have been pretty much a lifelong resident of the township or the city?

A. That's correct.

Q. Back in or about February of 1999, a series of ordinances were adopted by the township, which bring us here today. Are you familiar with those ordinances, the adult entertainment ordinances, I guess, for a lack of a better term?

A. Yes.

Q. How did you first become familiar with those ordinances?

A. I processed the paperwork to put it on the agenda.

Q. Okay. Was that the first time that you had learned, while you were processing the paperwork to put it on the agenda, that these ordinances were being discussed by the township?

A. I believe so.

Q. Okay. Perhaps you could explain to me as the township clerk what the process of ordinance adoption is in the township. And let's talk about an ordinance that is not a zoning ordinance, because I understand that process is a little different, correct?

A. Correct.

Q. Let's just talk a regular ordinance, not in zoning?

A. A department would have an ordinance

that they

would want to bring forth for consideration to the board,

they would draft the ordinance, have it reviewed. Upon

review, usually of legal counsel and things of that nature, a

final draft of the ordinance would be directed to the

supervisor's office with a request that it be placed on the

agenda for consideration.

Q. Okay.

A. The supervisor would then, you know, give it a

review, cursory or in-depth, and then either okay it or not

okay it for placement on the agenda.

Q. Okay.

A. At that point then the department makes the

appropriate numbers of copies of the document, brings to the

clerk's office with the approval for it to go on the agenda,

and we place it on the agenda.

Q. Okay. How is a zoning ordinance adopted?

A. I don't have a lot of experience with zoning

ordinances prior to when they come to the part that I am

aware of for placing it on the agenda. I am not familiar

with their specific deadlines for their process.

Q. Okay. Now, you said that you first became aware

of these ordinances once they were being placed upon the

agenda, correct?

A. Correct.

Q. So that was after they were drafted by whatever

department proposed them, correct?

A. Correct.

Q. After they were reviewed by whoever may have

reviewed them, correct?

A. Correct.

Q. After they were corrected, if there were any

corrections to them, correct? And by that I mean, for

example, if they were sent off to legal counsel and legal

counsel said do this or that, that step was already done

before you got them, correct?

A. Yes.

Q. Okay. And they had been approved for placement on

the agenda by the supervisor; is that correct?

A. Yes.

Q. What information do you recall being provided to

you to process? Was it just -- was it the ordinance itself

or anything else?

A. I don't recall specifically how that one came into

being. Sometimes what we get initially is just the cover

sheet, sometimes it is the full documents that come.

Q. Do you ever get ordinances to process that and

have materials in support of them? For example, somebody

wants to adopt ordinance 2-16-99-26, let's just use that as

an example, and they give you the ordinance for -- after it

has opinion approved. Do they ever give you any materials to

put with it?

A. Yes.

Q. Okay. In this case, do you know whether there

were materials provided to be put with the

ordinance?

A. I don't know.

Q. Is there a copy of what was provided to the board

maintained by the clerk's office?

A. Yes.

Q. Where is that maintained?

A. The agenda pack.

Q. Okay. Do you know if there is an agenda pack for

this ordinance or these set of ordinances?

A. Yes.

MR. RUBIN: Mr. Szymanski, would it be possible to

get that agenda pack?

MR. SZYMANSKI: Sure, we will do what we can. I

suggest you give me a letter or document request or something

to remind me.

MR. RUBIN: Is that something we could get today,

perhaps in review so we don't have to --

MR. SZYMANSKI: We are going to take a look at it

first.

MR. RUBIN: Is the answer, then, no?

MR. SZYMANSKI: Yeah, we are not going to get it

today, we will be happy to get it for you.

Q. (BY MR. RUBIN) : Okay. Have you reviewed the

agenda pack prior to your deposition today?

A. No.

Q. Have you review any materials prior to your

deposition?

A. I saw a cover sheet of the ordinance.

Q. Anything else?

A. No.

24 Q. Now, after you prepared this agenda pack, did you

25 have anything else to do with this ordinance or these series

1 of ordinances?

2 A. Yes.

3 Q. What else did you have to do?

4 A. Once the board either approves or disapproves an

5 ordinance, a synopsis of the ordinance or sometimes the

6 ordinance in its entirety becomes a part of the minutes for

7 publication. It is my responsibility to see that that part

8 of it gets taken care of.

9 Q. Do you know if there is a synopsis -- well,

10 strike that. We know that there are minutes, correct, from

11 the meetings that adopted these?

A. Yes.

Q. Is there any other materials that you may have

come into contact with relative to these ordinances other

than the synopsis or the ordinances themselves?

A. I am not sure I understand what you mean.

Q. Any other documents that you may have come into

contact with or possessed other than the ordinances

themselves and the minutes of the board of trustees adopting

them?

A. Only the supporting information that would have

gone to the board.

Q. Okay. What types of information would have been

included in that?

A. I can't say specifically to this but --

Q. In general

A. In general, sometimes there is a memo or a map,

that type of document.

Q. For example, do you know if the building

department or planning, or whatever it may be called, does

staff reports? Strike that. Let me see if I can rephrase

this. There are typically with ordinances staff reports

provided to the board?

I don't know.

Do you recall what other information or what other

specific information may have been provided as part of this

agenda pack?

A. No, sir.

Q. After getting that material back,

preparing --

did you prepare the minutes of those meetings?

A. Yes.

Q. How -- what types of information do you put in

the minutes of those meetings?

A. The action of the board.

Q. For example, does the township record in any

fashion, board hearings?

A. Yes.

Q. How are those recorded?

A. On a tape recorder.

Are those tapes of the board's meetings retained

in any way?

A. No.

Q. So they are destroyed after the meetings?

A. If you mean by destroyed , are they taped

over,

yes.

Q. How long do you typically maintain tapes of those

meetings?

A. Until they next meeting.

Q. Are there ever any times that you retain a tape

a meeting?

A. Yes.

Q. Okay And what circumstances would you maintain a

tape of a meeting?

A. At the request of the supervisor or the clerk.

Q. Do you know whether or not the tapes of the

meetings regarding the adoption of these ordinances were

maintained?

A. I don't believe they were.

Q. Was there ever any discussion about maintaining these tapes, that you can recall?

A. No.

Q. And if they were — if they were maintained, who would have possession of them? I mean, which officer of the township?

A. clerks's office

Q. And that's the office that you run?

A. That's correct.

Q. And are they locatable if they were maintained?

A. Yes.

Q. Have you ever looked for those tapes?

A. No.

Q. Other than putting together the agenda, so to speak -- I am sorry, the agenda pack, and putting together

the meeting minutes afterwards, have you had other contact

with -- had anything to do with these ordinances other than

appearing here today for your deposition?

A. I am not sure -- you mean any input or any

influence?

Q. Sure. Let me see if I can rephrase it.

A. Okay.

Q. And for all of these questions, I don't want to

hear about any conversations or discussions that you had with

Mr. Szymanski or somebody else from the legal office, just so

that you understand, okay?

A. Yes.

Q. Have you, subsequent to the time that these

ordinances were adopted, done anything as it related to these

ordinances?

A. No.

Q. So, for example, as the clerk, have you ever been

asked to -- have you ever retrieved or directed anybody to

retrieve information from the clerk's office as it relates --

A. Pertaining to this matter?

Q. Pertaining to these ordinances or any matter

relating to them?

A. Yes.

Q. What have you done as it relates to these

ordinances?

A. We had a FOIA request for them.

Q. You say you had a FOIA request for the ordinances

themselves?

A. Yes.

Q. For anything else related to the ordinances?

A. No.

Q. Have you ever conducted or had somebody conduct a search for records or for all of the records maintained by the township as it relates to the adoption of these ordinances?

A. No.

Q. Is there a central place that all of these records are maintained as it relates to the adoption of these ordinances?

A. Yes.

Q. Where would that be?

A. The clerk's office.

Q. Any other contact other than the agenda pack,

preparing the minutes, answering the FOIA request, any other

contact with these ordinances?

A. No.

Q. Did you ever have any input in the drafting of

these ordinances?

A. No.

Q. Did you put -- did you provide any information to

the board of trustees or any other department within the

township as it related to adoption of these ordinances?

A. No.

Q. Have you ever been asked to -- strike that.

Other than in an executive session, so other than

in an executive session talking about this case, and I

understand there is one other case that was involved in these

ordinances, but other than that, has the board of trustees

since you have been sitting on it since November had an

opportunity to discuss these ordinances in regular session?

A. No.

Q. Or anything pertaining to these ordinances?

A. No.

Q. As I understand it, you said that you were a

lifelong resident of Van Buren or its immediate area except

for when you were a student?

A. Correct.

Q. When was the first time that you became aware of a

business known as Legg's Lounge?

A. When I started working here.

Q. Which would have been back in 1981?

A. Correct.

Prior to that, as a resident of the community, were you aware of that business?

A. No.

Q. In what capacity, since you have been working for the township, have you had occasion to become aware of that business?

A. For a short period of time I assisted in the public safety office as a clerk typist.

Q. Okay. And while you were a clerk typist in the public safety department, what information was it that you learned?

A. Just that it was a business here and that obviously the police department had contact.

Q. Other than that one time or that time when you

were with the public safety, have you had any other contact

or had reason to know about the business?

A. Do. you mean specific knowledge or just general --

I mean, general --

Q. Let's start with specific.

A. I don't recall specific but I know generally that

it is a business located here, the type of business that they

are.

Q. Okay. Have there been any incidences or problems

that would have caused you -- that that business would have

had to cause you to gain more specific knowledge in any of

the capacities that you have had working for

the township?

A. Unless it was something that made the paper, it

wouldn't be something that I would necessarily have known

about.

Q. So you were never sitting around a board meeting

here talking about various businesses in the community and

some incident that may have caused you to talk about it?

A. No.

Q. Is the clerk's office -- is that the office that

maintains, for example, when people write letters to the city

and things like that? For example, somebody writes the

supervisor something, is the clerk's office the ultimate

repository for that kind of stuff?

A. Sometimes.

Q. Do you know if the clerk's office maintains a

file, for example, on Legg's Lounge?

A. Do I know if we have a file?

Q. Yes.

A. No.

Q. You said that you are a resident of the community?

A. Correct.

Q. As a resident of the community, has that business

caused you any specific problems?

A. Me personally?

Q. Yes.

A. No.

Q. Anybody you know who lives in the township, has it

caused any specific problems to?

A. No.

Q. Do you know the area where Legg's Lounge is located?

A. Yes.

Q. And that's along Michigan Avenue?

A. Correct.

Q. Kind of what was referred to, if I am correct, as the northwest quadrant of the city?

A. Of the township, yes.

Q. Of the township, I apologize. Is that a commercial or residential area over on that part of the township, if you know?

A. Residential.

Q. Are there commercial businesses in that area as well?

A. Yes.

Q. I understand that there is at least a bar in that

area -- another bar?

A. Yes.

Q. I know there is a mobile home park in that area?

A. Correct.

Q. Are there any other types of businesses in that

area?

A. Probably, I can't think of their names but there

are other things up there.

Q. Okay. Are you aware of any specific problems that

that area of the town is experiencing?

A. As far as --

Q. Just in general? Sitting as a member of board of

trustees?

A. Not that I can recall.

Q. Nobody has complained to the board of

trustees

that their property values are going down over there?

A. Not in a public forum.

Q. Nobody has complained that there is a whole lot of

crime going on over there in that area of town?

A. No one has reported anything to me.

Q. Okay.

A. So--

Q. And no one, at least since you have been a member

of board of trustees since November, has brought that matter

to the board of trustees's attention, correct?

A. Correct.

Q. That area of town, is that part of the area of the

township that is experiencing some growth?

A. I don't know.

Q. Did you have any other involvement with the adoption of these ordinances?

A. No.

Q. Have you had any other involvement with -- strike that.

As part of these ordinances, they require certain licensing to take place of adult businesses, were you aware of that?

A. Yes.

Q. Has the clerk's office taken any steps to prepare materials in the event that any of these businesses have to be licensed?

A. I have not done so.

Q. Do you know if there is a previous plan in

place

19 to do so?

20 A. No, I do not.

21 Q. As a clerk, that might be something that was

22 important to know, would you agree, what licenses you may

23 have to issue?

24 A. Yes.

25 Q. Is there an application form for somebody to fill

1 out if they want to license an adult business, in the clerk's

2 office?

3 A. I don't know.

4 Q. Is there anybody in the township other than the

5 lawyer for the township who is responsible for maintaining

any of the files, specifically for Legg's Lounge?

MR. SZYMANSKI: Assumes -- she already testified that there are no specific Legg's Lounge files in the clerks office.

MR. RUBIN: Here, let me see if I can rephrase that question.

Q. (BY MR. RUBIN): Is there anybody at the clerk's office or under either you or somebody working for you who is responsible for maintaining any files as it relates to Legg's Lounge for any purpose? For example, does the building department maintain files of businesses?

A. They maintain an address file.

Q. Okay.

A. Which has building documents -- documents of that

nature. The only other file that I could think of would be

-- the liquor license file would be the only other file that

I know of that would reference them particularly.

Q. Who has the liquor license file?

A. We have those.

Q. Okay. Do you know how many liquor licensed

businesses there are in the township? Actually let me

rephrase that. Do you know how many liquor licensed

establishments licensed to sell alcohol to people sitting

there or at the premises as opposed to a party store where

they can buy them and take them away?

A. I don't know the exact number for that.

Q. Do you have an approximate?

A. Perhaps eight to nine.

Q. Okay. Are those maintained in, for example, a drawer here at the clerk's office?

A. They would be in the same file with the liquor license. There is just a file that has documents we receive from the state.

Q. So you have a file -- liquor license file?

A. Correct.

Q. And whatever documents you get relative to the liquor license goes in that file?

A. Right.

Q. Is there -- I understand there is a township assessor's office?

A. Correct.

Q. Is that overseen by the clerk's office?

A. No.

Q. Who is the township assessor?

25 A. I believe our assessing is actually done by Wayne

1 County, we do have assessment files here.

2 Q. How does one go about reviewing those, if you

3 know?

4 A. Reviewing assessment files?

5 Q. Yes, do they go to the clerk's office, do they go

6 to the treasurer's office, do they go to the assessor's

7 office?

8 A. Well, the clerk's office doesn't have any of the

9 assessor's records, per se, the treasurer's office has tax

10 and assessment information, the assessor's office has the

11 actual field sheets. There is also a computer in the lobby

12 that people can access for information.

Q. So if I wanted to go access information about a particular parcel of property, I could just type it into a computer?

A. Correct.

Q. To your knowledge, has the city -- I am sorry, has the township ever done any studies on the effect of adult entertainment within the township?

A. No.

Q. To your knowledge, has anybody ever taken a look at the property values in the areas immediately around, for example, adult businesses in the township and compared them to any other portion of the township?

A. No.

Q. Do you know what information is, perhaps, in the

ordinance adoption file that you maintain?

A. For this -- for these ordinances?

Q. Yes.

A. There would be a first reading ordinance, a copy

of the publication, a copy of the synopsis.

Q. Okay. For example, do you know if this is a big

or a little file?

A. It is not in a separate file, it is just with all

of the other ordinances.

Q. Okay. Do you know -- would it be -- do you know

whether it would be bigger or smaller than --

A. The whole file?

Q. Yes, than perhaps the pack of police reports that

Mr. Szymanski so kindly provided me today? Would it be this

big or smaller?

MR. SZYMANSKI: No, no, it was provided to you before.

MR. RUBIN: It was in my office today, I apologize.

THE WITNESS: The entire file would be larger than that.

Q. (BY MR. RUBIN) : Okay. Do you know what information is in there specifically other than the ordinance, the first reading, the publication?

A. Perhaps the memo to the board, I am not sure off

the top of my head what else would be there.

Q. Okay.

MR. RUBIN: Thank you. I have nothing further.

MR. SZYMANSKI: No questions.

(Whereupon deposition was concluded at about 12:01 p.m.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
SS)
COUNTY OF OAKLAND)

I hereby certify that on the date and at the place hereinbefore set forth, I reported stenographically the proceedings held in the matter hereinbefore set forth, and that the testimony so recorded was subsequently transcribed by me with the use of computer-aided transcription under my direction and supervision, and that the foregoing is a full, true and accurate transcript of my original stenotype notes.

DATE: 7-10-01 /S/
Kelly Forfar
(CSR-3618)
Certified Reporter

Notary Public:
County of Oakland
My Commission Expires:
January 1, 2002